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No. 91-1382

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE SHUBERT ORGANIZATION, INC., *et al.*,

Petitioners,

—v.—

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION FIRST JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court's *Penn Central* decision (438 U.S. 104 [1978]) preclude an as-applied Takings Clause challenge to a landmark designation?

2. In determining whether the interior and exterior landmarking of certain theatres constitutes a compensable taking, should a court apply solely a bright-line test as to whether all value has been destroyed, or must there be a review of all relevant factors, including, where necessary, fact-finding (or remand for fact-finding) on disputed issues of material fact?

3. Are the police-power and equal protection limitations upon governmental real property regulation, which inhere in the requirement of a comprehensive plan, satisfied in landmarking in general, or in New York City's landmarking ordinance in particular?

4. Does a Special Demolition Permit requirement, applicable only to a handful of specified properties, effectively prohibiting any change in their use while neighboring properties remain unrestricted, constitute unconstitutional reverse spot-zoning?

LIST OF PARTIES

The parties to the proceeding below appear in the first footnote.* Petitioners are all the original plaintiffs. Respondents other than Save The Theatres, Inc., are all the original defendants. Respondent Save The Theatres, Inc., was originally not a party, but was granted leave by the trial court, first to appear as *amicus*, and then to intervene.

None of the corporate parties has publicly traded stock. The information required by this Court's Rule 29.1 is set forth in the second footnote.**

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* Petitioners are The Shubert Organization, Inc., Nederlander Organization, Inc., Jujamcyn Theaters Corporation, The League of American Theaters and Producers, Inc., Nederlander Amusement Corp. of Maryland, Nederlander Theatrical Corp., All State Amusement Co. of Illinois, Inc., Hellinger/Nederlander 46th Street Corp., Lunt Theatre Co. (a New York general partnership), Rose Nederlander Associates, Inc., Alvin Nederlander Associates, Inc., and 239-247 West 45th Street Corp.

Respondents are Landmarks Preservation Commission of the City of New York, City Planning Commission of the City of New York, Board of Estimate of the City of New York, The City of New York, and Save The Theatres, Inc.

** Petitioner The Shubert Organization, Inc., is a wholly-owned subsidiary of The Shubert Foundation, Inc., a not-for-profit corporation fostering the theatre arts. Petitioner The Shubert Organization, Inc., owns a one-half interest in petitioner 239-247 West 45th Street, Inc., together with a one-half interest owned by the Estate of Irving Berlin. Petitioners Nederlander Amusement Corp. of Maryland, Nederlander Theatrical Corp., All State Amusement Co. of Illinois, Inc., Hellinger/Nederlander 46th Street Corp., Rose Nederlander Associates, Inc. and Alvin Nederlander Associates, Inc., are all wholly-owned subsidiaries of petitioner Nederlander Organization, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the May 16, 1991, decision and order of the New York Supreme Court, Appellate Division, First Judicial Department, which affirmed the judgment of the *nisi prius* court dismissing petitioners' complaint.

OPINIONS BELOW

The opinion and order (one paper) of the New York Appellate Division, dated May 16, 1991, is reported at 166 A.D.2d 115 and at 570 N.Y.S.2d 504, and is reproduced in the appendix hereto at App. 1a.

The opinion of the court of original instance, dated December 5, 1989 (New York Supreme Court, New York County, Hon. Irma Vidal Santaella, J.), is not reported. It is reproduced in the appendix hereto at App. 9a.

The refusals of the New York Court of Appeals to entertain an appeal from the order of the Appellate Division, dated September 19, 1991 (dismissing appeal purportedly taken as of right) and December 18, 1991 (denying discretionary leave to appeal) are respectively reported at 78 N.Y.2d 1006, 580 N.E.2d 1059, 575 N.Y.S.2d 456 and at ___ N.Y.2d ____, ____ N.E.2d ____, ____ N.Y.S.2d ____. They are both reproduced at App. 43a.

STATEMENT OF JURISDICTION

Petitioners seek review from the opinion and order of the New York Supreme Court, Appellate Division, First Judicial Department, dated May 16, 1991, which affirmed dismissal of their complaint. The New York Court of Appeals, on September 19, 1991, dismissed an appeal purportedly taken as of right from the said order of the Appellate Division, and on December 18, 1991, denied discretionary review.

This Court has jurisdiction to review by writ of certiorari a final judgment or decree rendered by the highest court of a State in which a decision could be had, where a title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States (28 U.S.C. § 1257[a]).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that "private property [shall not] be taken for public use without just compensation." The Fourteenth Amendment to the United States Constitution provides in pertinent part that "No State shall deprive any person of

. . . property without due process of law, or deny any person within its jurisdiction the equal protection of the laws."

The Landmarks Law of the City of New York (N.Y.C. Admin. Code, Title 25, C.3), is set forth in relevant part at App. 44a.[1] Relevant parts of New York City's Zoning Resolution are reproduced at App. 81a.

STATEMENT OF THE CASE

In May 1982, the New York City Board of Estimate promulgated regulations affecting solely forty-four named theatres in the Broadway theatre district (the "Listed Theatres"), prohibiting their demolition unless a Special Demolition Permit issued upon a showing either that the theatre was unsafe, or that demolition would not hurt the entertainment sector of the City's economy (Zoning Resolution 81-742 [1982], App. 81a, *infra*). At the same time, the Board of Estimate also mandated that the City Planning Commission develop a comprehensive plan to strengthen the theatre industry, including "actions" of the Landmarks Preservation Commission (Zoning Resolution 81-74 [1982]). Simultaneously, the Landmarks Preservation Commission announced a public hearing on the proposed landmarking of the Broadway theatres. After three days of hearings in 1982, the Commission in November 1987-January 1988 issued forty-seven landmark designations affecting twenty-eight theatres (nineteen as to both exterior and interior, two as to exterior only, and seven as to interior only).[2] Of these twenty-eight theatres,

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1 Among the declared purposes of the Landmarks Law are to "protect and enhance the city's attractions to tourists and visitors and the support and stimulus to business and industry thereby provided" (§ 25-301[b], *infra* at App. 45a).

2 No transcript had been made of the 1982 hearings, and none would be made until after this action was commenced in May 1989, although seven of the eleven commissioners had changed before the landmark designations here in issue were made.

twenty-two (involving thirty-nine designations) are owned and operated by petitioners, and are the subject of this action.[3]

The Board of Estimate approved *en masse* these forty-seven designations without change on March 10, 1988. The three theatre-owner organizations (Shubert, Nederlander, Juyamcyn) were first given five minutes each (*i.e.*, an average of nineteen seconds per designation) to be heard.

Petitioners timely sought judicial review of the designations, as provided under New York procedure, in the trial-court (New York Supreme Court, New York County) on constitutional and other grounds, and sought damages. Since the Landmarks Preservation Commission had expressly refused to consider economic evidence,[4] petitioners presented to the trial court evidence that, in particular, interior landmarking (twenty-one of the twenty-two theatres landmarked had their interiors designated) interfered with and cost burdened continued use of these buildings as theatres.[5] The trial

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3 Two of the Listed Theatres had been landmarked before 1982. Two more were landmarked in 1982, three in 1985, and one in 1987 before the ones here in issue. The balance of the Listed Theatres were either not considered for designation, or not designated.

4 See remarks of Landmarks Commission Chairman Norman at Commission Meeting of December 9, 1986 (App. 84a):

> "[A]s you know, the Commission does not look to cost in terms of how these things are replaced or changes made on a building. . . . . So the argument that cost should be considered by the commission, I have rejected."

5 An interior landmark designation interferes with the owner's ability to adapt the theatre to changing productions. The full adverse impact of these interior designations has been averted (so far) by the willingness of the Landmarks Commission, although unauthorized by law to do so, to overlook production-related changes, provided, however, that the owner pledges to restore it to its "original" (*i.e.*, moment of designation) condition at the end of the show's run, regardless of (i) cost, (ii) the necessity of the inevitable new production-related changes when the next show moves in, and (iii) the fact that the public will have no "benefit" from the "restored" interior in the interim while the theatre is dark. While this informal relaxation of the rules is still confis-

court declined to hold an evidentiary hearing[6] or otherwise make findings on this point, because, it erroneously held, the agency below (where the evidence was not presented and which had expressly refused to consider economic evidence) had already ruled on the question (see trial court opinion at App. 27a, *infra*).[7]

The trial court also dismissed, without an evidentiary hearing, petitioners' damage claims, and did not even discuss, much less rule upon, the petitioners' claim that the transferable air rights—accorded petitioners by virtue of the landmark designations—were without value, because of a lack of buildable sites within the receiving zone which could utilize such rights.

On appeal, the Appellate Division of the Supreme Court affirmed (App. 1a). The Takings Clause challenge was disposed of summarily (App. 7a):

> "Since the [United States] Supreme Court in *Penn Central*, *supra* [438 U.S.] at 138, clearly ruled that the application of the Landmarks Law does not affect a tak-

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catory in the long run, the toleration by the Commission of production-related changes is legally irrelevant. An attack upon the validity of formally promulgated rules may not be avoided merely because the agency announces it will not enforce the rules to their full extent (*Abbott Laboratories* v. *Gardner*, 387 U.S. 136 [1967]).

6 Indeed, it even held, erroneously, that it was not empowered to hold an evidentiary hearing on any of the issues.

7 The trial court's refusal even to consider this question, of course, precluded evaluation by it of whether there was the substantial advancement of legitimate state interests as required by this Court's decisions (*see Nollan* v. *California Coastal Comm'n.*, 483 U.S. 825, 834 [1987]; *Agins* v. *Tiburon*, 447 U.S. 255, 260 [1980]; *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 127 [1978]). Neither preservation of theatre buildings (the Landmark Commission's professed goal) nor preservation of the theatre industry (what petitioners contended, and amply demonstrated below, was the Commission's true goal, an admittedly illegal one for the Commission under New York law) is substantially advanced by designations which may prevent the continued use of the theatre buildings as theatres.

> ing of the property, the constitutional challenge thereby is resolved. Furthermore, under the standards set forth in [certain New York cases], the petitioners have not carried their burden of demonstrating that the Landmarks Law as applied to these particular theatres denies them essential use of their property."

The Appellate Division (contrary to the trial court) also held that, in the absence of final agency action on applications by petitioners for renovations or alterations, the claim of impairment of economic use was not ripe for review.[8] As to air rights, the Appellate Division merely observed that such rights inured to petitioners by virtue of the designations, and that, "absent a successful challenge, [the rights] must be presumed to have economic benefit" (App. 7a). It made no mention of petitioners' contention, never passed upon at any level, that such rights had no value whatsoever because of the lack of receiving sites which could use them. The Appellate Division (and the court below) also failed to address petitioners' claim of discrimination, in that other similarly situated theatres were not landmarked.

The New York Court of Appeals dismissed an appeal purportedly taken as of right (App. 43a), and denied leave for a discretionary appeal (App. 43a).

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8 This conclusion ignored the fact that *Penn Central* (at 132) had questioned the right of appellants there to challenge the consequences of designation, as they had not challenged the act of designation when it was made.

REASONS FOR GRANTING THE WRIT

THIS CASE RAISES THE QUESTION OF THE PROPER APPLICATION OF *PENN CENTRAL* AND ITS PROGENY TO AS-APPLIED TAKINGS CLAUSE CHALLENGES

Perhaps influenced by the fact that the landmarks law in issue here (New York City's) is the same one as was involved in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), and that the Takings Clause challenge there was rejected, the New York Appellate Division, in the case at bar, in a one-sentence discussion, ruled that "the constitutional challenge thereby is resolved" (App. at 7a). Of course, *Penn Central* never purported to settle for all time the constitutionality of *every* designation under New York City's local law; indeed, it expressly did not even purport to settle for all time the constitutionality of the very designation there in issue, that of New York's Grand Central Terminal. As the Court there noted, "We emphasize that our holding today is on the present record, which in turn is based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion" (Footnote 36 at p. 138).

While the *Penn Central* Court considered, and rejected, a challenge to New York City's landmarks law on its face, it expressly noted that this was "not. . . the end of our inquiry" (at 135), and acknowledged its duty to consider "the question of the severity of the impact of the law on appellant's parcel, and its resolution in turn requires a careful assessment of the impact of the regulation on the Terminal site" (at 136). Plainly, the *Penn Central* Court did not rule that landmarking could be challenged only upon a showing that a designation *totally destroyed* the value or use of the property.[9]

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9 In its earlier discussion of the questions presented, the *Penn Central* Court had identified two, namely (1) whether there had been a taking,

In identifying the factors it considered relevant to its particular inquiry, the *Penn Central* Court certainly did not intend to create a bright-line test as to when a regulatory "taking" has occurred. Indeed, *Penn Central* itself noted the inability to develop any set formula for such cases (at 124). This is completely in keeping with the takings jurisprudence of this Court, as developed both before and subsequent to *Penn Central. See Pennell* v. *City of San Jose*, 485 U.S. 1 (1988); *Bowen* v. *Gilliard*, 483 U.S. 587 (1987); *Hodel* v. *Irving*, 481 U.S. 704 (1987); *Keystone Bituminous Coal Ass'n.* v. *DeBenedictis*, 480 U.S. 470 (1987); *MacDonald Sommer & Frates* v. *Yolo County*, 477 U.S. 340 (1986); *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979).

As this Court (per O'Connor, J.) noted relatively recently (*Hodel* v. *Irving*, 481 U.S. 704, 713-4 [1987]):

> "The framework for examining the question whether a regulation of property amounts to a taking requiring just compensation is firmly established and has been regularly and recently reaffirmed. [Citations omitted]. As THE CHIEF JUSTICE has written:
>
> > '[T]his Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the gov-

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and "(2) if so, whether the transferable development rights afforded appellants constitute 'just compensation' within the meaning of the Fifth Amendment," and added that it needed to discuss only the first question. Nonetheless, the Court did (at 137) address the air rights, which had been stipulated to be valuable. Subsequent decisions of this Court, applying the two-component test of a regulatory taking claim enunciated in *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 348 (1986) (an owner must establish that [i] the regulation has "taken" his property, and [ii] any proffered compensation is not "just"), have treated *Penn Central* as containing an alternative holding that the value of the air rights prevented a showing of lack of just compensation. See the treatment of *Penn Central* in *MacDonald, supra* at 350, and in *Williamson County Regional Planning Comm'n.* v. *Hamilton Bank*, 473 U.S. 172, 187 (1985).

> ernment, rather than remain disproportionately concentrated on a few persons." [*Penn Central Transportation Co.* v. *New York City*, 438 U.S.] at 124. Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance. *Ibid.*' *Kaiser Aetna* v. *United States*, *supra*, [444 U.S. 164] at 175 [1979]."[10]

Insofar as a particular factor is a subject of factual dispute not yet resolved, the facts would have to be found, even if no formal fact-finding below was required (*Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 [1971]), for effective judicial review of administrative actions requires reasoned findings (*Baltimore & Ohio R. Co.* v. *Aberdeen & Rockfish R. Co.*, 393 U.S. 87 [1968]). Depending on the circumstances and the jurisdiction of the courts and agencies involved, "there may be independent judicial factfinding when issues that were not before the agency are raised" (*Overton*, *supra* at 415), or, if the reviewing court itself cannot make findings, it may remand to a trial court (as was done in *Overton*) or to the administrative agency (*Pension Benefit Guaranty Corp.* v.

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10 Yet another factor which must be here weighed is whether the political unaccountability of the landmark designations, because they are without cost to the public, has here caused a toleration of unworthy designations, thus vitiating the police-power basis of allowing such restrictions to begin with. "The politically attractive feature of regulation is not that it permits [results] to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved 'off budget,' with relative invisibility and thus relative immunity from normal democratic processes" (Scalia, J., concurring in part and dissenting in part in *Pennell* v. *City of San Jose*, 485 U.S. 1 at 22 [1988]). There can be no question that New York City's Landmarks Commission would not have here proceeded with such a heavy hand if it had had to cost-justify forty-seven designations. Indeed, an architect member of the Commission admitted that many of the theatres here designated were architecturally "no great shakes" (App. 85a).

LTV Corp., ____ U.S. ____, 110 S.Ct. 2668 [1990]; *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729 [1985]), as appropriate.

The New York courts have thus clearly misread *Penn Central* and other controlling authorities of this Court, when they refuse to engage in the "ad hoc, factual inquiries" (*Kaiser Aetna*, *supra* at 175) mandated by this Court, and instead apply a simplistic bright-line test, to determine whether a compensable taking has incurred. This Court ought therefore grant a writ of certiorari to make manifest the method of application of Takings Clause case principles in the landmarking context.

THIS CASE INVITES THIS COURT, IF THE COURT DEEMS IT APPROPRIATE, TO REVIEW LANDMARKS LAW'S PLACE WITHIN TAKINGS CLAUSE JURISPRUDENCE

While, as noted above, petitioners contend that no aspect of *Penn Central* need be called into question either for this case to merit review by certiorari, or for petitioners to prevail upon such review, nonetheless this case does afford this Court the opportunity, if the Court deems it appropriate, to reconsider the constitutional and logical pinnings of landmark designations in general, or of *Penn Central* in particular.

The affirmative power of governments to designate properties as landmarks, and thereby restrict or limit the rights of ownership, is not here disputed.[11] "It is a separate question, however, whether an otherwise valid regulation so frustrates

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11 Petitioners do dispute (unlike the appellants in *Penn Central*) whether the designations here are appropriate to the public purposes supposed to be served; whether the properties are capable of earning a reasonable return; whether they can continue to be used for their historic purpose; whether the transferable air rights conferred are valuable; and the "specific factual premises" below (or, more precisely, the failure to find facts). Compare *Penn Central* at 129, where it is stated that none of these points was there in dispute.

property rights that compensation must be paid" (*Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 [1982]). As Justice (now Chief Justice) Rehnquist noted in his dissenting opinion in *Penn Central* (n. 14 at 152), "[M]any States and cities in the Nation have chosen to preserve landmarks by purchasing or condemning restrictive easements over the facades of the landmarks and are apparently quite satisfied with the results."

"The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" (*Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 [1922]). The Fifth Amendment's Just Compensation Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong* v. *United States*, 364 U.S. 40, 49 [1960]).[12] The principle is generally satisfied when there is "an average reciprocity of advantage" (*Pennsylvania Coal*, *supra* at 415), when "[a]ll property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality but also for the common benefit of one another" (Rehnquist, J., dissenting in *Penn Central*, at 140; *see also Hodel* v. *Irving*, 481 U.S. 704 [1987]; *Keystone Bituminous Coal Ass'n.* v. *DeBenedictis*, 480 U.S. 470 [1987]). This "average reciprocity of advantage" is usually accomplished by a comprehensive plan, as in a community-wide zoning ordinance (*Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 [1926]). This, however, is absent in landmarking in general, and in New York City's landmarking ordinance in particular. As the New York Court of Appeals observed in considering this ordinance in *Penn Central*, 42 N.Y.2d 324,

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12 In terms of the case at bar, the *Armstrong* question is whether it is petitioners or the public as a whole who should, in all fairness and justice, bear the cost of regulations which (i) are designed in part at least to foster public interests by attracting tourists and visitors and thereby stimulate the City's business and industry (see Footnote 1, *supra*), and (ii) by no stretch of the imagination regulate anything which could be called a nuisance (*cf. Lucas* v. *South Carolina Coastal Council*, No. 91-453, *cert. granted*).

329-330, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd.*, 438 U.S. 104 (1978):

> "Restrictions on alteration of individual landmarks are not designed to further a general community plan. Landmark restrictions are designed to prevent alteration or demolition of a single piece of property. To this extent, such restrictions resemble 'discriminatory' zoning restrictions, properly condemned".

The New York Court of Appeals' analysis discloses the fatal flaw in New York's scheme of landmarking—the absence of the requisite "average reciprocity of advantage." Upon appeal, however, the majority in this Court distinguished the New York City Landmarks Law from discriminatory zoning by concluding that "the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city" (at 132), and adding in a footnote that "[W]e do not understand the New York Court of Appeals to disagree with our characterization of the law" (*id.*, n. 28).[13]

It is respectfully submitted that the *Penn Central* majority's distinction of landmarking from discriminatory zoning is untenable and should be abandoned. *First*: The New York Court of Appeals has shown, subsequent to *Penn Central*, that it indeed meant what it said in its *Penn Central* decision, namely that in landmarking there is no comprehensive plan or average reciprocity of advantage,[14] which the New York

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13 In dissent, Justice (now Chief Justice) Rehnquist also recognized the requirement for the "average reciprocity of advantage" (at 139-40), but, unlike the majority, he did not find there to be a comprehensive plan (*id.*).

14 "To be sure individual landmark designation involves greater problems than general zoning or historical district regulation, because unlike those types of restrictions the individual landmark designations do not involve corresponding restrictions of the surrounding parcels which operates [sic] to the benefit of the landmark owner (*Penn Cen-*

court continues to believe is unnecessary. The strained reading this Court's *Penn Central* majority put on what the New York court had written, in order to save its result, was simply wrong.

Second: In any event, the "comprehensive plan" which this Court's *Penn Central* majority (at 132) read into the New York ordinance (which was in fact never there) would not have withstood analysis had it indeed been in the ordinance. To analogize to zoning, a "plan" to zone a parcel here, a parcel there, and other parcels, if any, when one gets around to them, is nothing but piecemeal zoning.[15] Universally understood, along with "spot zoning" (see *infra*), to be the antithesis, not an example, of a comprehensive plan, piecemeal zoning is universally condemned. Specifically, it is as prohibited in New York (*Asian Americans for Equality* v. *Koch*, 72 N.Y.2d 121, 517 N.E.2d 265, 531 N.Y.S.2d 782 [1988]; *Freeman* v. *City of Yonkers*, 205 Misc. 947, 129 N.Y.S.2d 703 [Sup. Ct. Westchester Co. 1954]),[16] as it is elsewhere (*Cassel* v. *City of Baltimore*, 195 Md. 348, 73 A.2d 486 [1950]; *Little* v. *Board of County Commrs.*, 631 P.2d 1282 [Mont. 1981]; *Kozesnik* v. *Township of Montgomery*, 24 N.J. 154, 131 A.2d 1 [1957]; *Higginbotham* v. *City of The Village*, 361 P.2d 191 [Okla. 1961]; *Palazzi* v. *State*, 113 R.I.

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tral Transp. Co. v. *City of New York*, 42 N.Y.2d 324, 330, aff'd 438 U.S. 104)." (*Society for Ethical Culture* v. *Spatt*, 51 N.Y.2d 449, 454, 415 N.E.2d 922, 434 N.Y.S.2d 932 [1980]). Significantly, the page citation to the New York Court of Appeals' *Penn Central* decision is to the very language upon whose meaning Justices Brennan and Rehnquist disagreed when that case reached this Court.

15 While sometimes used (also in a pejorative sense) as synonymous with "spot zoning", "piecemeal zoning" is usually more precisely defined as "when only part of the land within a municipality is regulated by the zoning law" (*Asian Americans for Equality* v. *Koch*, 72 N.Y.2d 121, 130, 527 N.E.2d 265, 531 N.Y.S.2d 782 [1988]).

16 "[I]t is clear that, as a general proposition, a local legislative body does not have the power to re-zone property along a main artery of travel, lot by lot at a time. Such would be piecemeal zoning, which is generally prohibited" (at 956).

218, 319 A.2d 658 [1974]; *City of Pharr* v. *Tippitt*, 616 S.W.2d 173 [Tex. 1981]; *Shelton* v. *City of Bellevue*, 73 Wash.2d 28, 435 P.2d 949 [1968]; *Bell* v. *City of Elkhorn*, 122 Wis.2d 558, 364 N.W.2d 144 [1985]).

While this Court has never had occasion expressly to hold that a comprehensive plan is a constitutional requirement (indeed, this Court has rarely considered zoning cases, thus leaving the development of jurisprudence in this field largely to the State courts), decisions of this Court have assumed the necessity of a plan. Thus, in *Penn Central*, Justice Brennan noted for the majority (at 133 n. 29) that

> "When a property owner challenges the application of a zoning ordinance to his property, the judicial inquiry focuses upon whether the challenged restriction can reasonably be deemed to promote the objectives of the community land-use plan, and will include consideration of the treatment of similar parcels. See generally *Nectow* v. *Cambridge*, 277 U.S. 183 (1928)."

See also Justice (now Chief Justice) Rehnquist in dissent in *Penn Central* at 139-40; Justice Blackmun, concurring and dissenting in *Brendale* v. *Confederated Tribes*, 492 U.S. 408 at 458 (1989) ("the systematic and coordinated utilization of land that is the very essence of zoning authority"); and the discussion of *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), in the concurrence by Justice Stevens in *Moore* v. *City of East Cleveland*, 431 U.S. 494 at 514-15 (1977).

State court decisions have made it indisputably clear that the rationale of the prohibition upon piecemeal zoning, and of the corresponding requirement of a comprehensive plan, is the necessity of keeping the restrictions of zoning within the police power, and of protecting against arbitrary and capricious discrimination by the zoning authorities. The requirement of a plan is thus grounded in the Constitutional protections of Due Process and Equal Protection (*see*, *e.g.*, *Asian Americans*, *supra*, 72 N.Y.2d at 131; *Kozesnik*, *supra*, 24 N.J. at 166).

It is therefore submitted that the constitutional underpinnings of landmarking, only briefly considered by this Court in *Penn Central* (and never before or since), bear further consideration. Certiorari ought therefore issue herein.

THE SPECIAL DEMOLITION PERMIT REQUIREMENT CONSTITUTES UNCONSTITUTIONAL REVERSE SPOT-ZONING

It is clear that the police power to enact or enforce zoning restrictions is not unlimited (*City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 [1985]). In particular, courts have routinely intervened and struck down zoning restrictions as not being a proper use of the police power in a class of cases, often referred to as "spot zoning" cases.

"Spot zoning" is commonly defined as the process of singling out a parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of the surrounding landowners (*Munger v. Town of Exeter*, 128 N.H. 196, 512 A.2d 418 [1986]; *Clark v. City of Boulder*, 146 Colo. 526, 362 P.2d 160 [1961]; *Salvetti v. Zoning Board of Adjustment*, 429 Pa. 330, 240 A.2d 534 [1968]). "Reverse spot zoning" occurs where a governing authority rezones a particular property in a certain deleterious manner, although the property in the adjoining area is zoned or rezoned in a different and more beneficial manner. *See Tollius v. City of Miami*, 96 So.2d 122 (Fla. 1957); *Jackson v. Wilson*, 195 So.2d 470 (Miss. 1966); *Odabesh v. Mayor and Council of the Borough of Dumont*, 65 N.J. 115, 319 A.2d 712 (1974); *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587 (1976), 385 N.Y.S.2d 5, 350 N.E.2d 381, *app. dism. and cert den.*, 429 U.S. 990 (1976); *Vernon Park Realty v. City of Mount Vernon*, 307 N.Y. 493, 121 N.E.2d 517 (1954).

In the case at bar, the City, by virtue of the enactment of the Special Demolition Permit, has discriminatorily segre-

gated forty-four parcels and subjected them to special detrimental criteria that are not applicable to other parcels similarly situated, which, in contrast, were upzoned. A condition of the Special Demolition Permit ([81-742[c][2], App. 82a) means that a new structure replacing a Listed Theatre may be required to have substantially more floor space devoted to entertainment-related uses than a new structure on a neighboring non-Listed Theatre site, when the only distinction between the two sites is that they have had a different history of use. This is exactly what the controlling authorities condemn as unlawful reverse spot zoning.

Reverse spot zoning, as exemplified by the Special Demolition Permit requirement, is plainly and simply the unjustified and uncompensated frustration of private property rights for the ostensible benefit of the public. No matter how laudable the public goal may be, this discriminatory zoning mechanism is impermissible. This Court ought therefore grant a writ of certiorari to review the constitutionality of the Special Demolition Permit requirement.

CONCLUSION

This case presents substantial questions as to the proper application by State courts of *Penn Central* and other Takings Clause precedents to landmark designations, and invites explications by this Court of the Constitutional relation of the comprehensive plan, and its conceptual opposite, piecemeal or spot zoning, to land use regulation. The petition for a writ of certiorari ought therefore to be granted, and petitioners allowed to file their brief articulating at greater length and in greater depth why fundamental principles of constitutional law mandate a reversal herein.

Respectfully submitted,

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February 25, 1992

APPENDIX

Opinion of New York Supreme Court, Appellate Division, First Judicial Department, dated May 16, 1991

(Reported at 166 A.D.2d 115, 570 N.Y.S.2d 504)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

E. Leo Milonas, J.P.
Richard W. Wallach,
Sidney H. Asch,
Bentley Kassal,
George Bundy Smith, JJ.

THE SHUBERT ORGANIZATION, *et al.*,

Petitioners-Plaintiffs-Appellants,

For a Judgment Pursuant to CPLR Article 78 and a Declaration Pursuant to CPLR 2001,

—against—

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, *et al.*,

Respondents-Defendants-Respondents,

SAVE THE THEATRES, INC.,

Intervenor-Respondent-Defendant-Respondent.

ASCH, J

Petitioners, several theater owners as well as trade organizations, had sought, *inter alia*, in this declaratory relief and Article 78 proceeding, to annul the designation of twenty-two Broadway theatres as landmarks, and to declare null and void the underlying Landmarks Legislation and the anti-

demolition provision of the New York City Zoning Resolution.

Petitioners claim that the designation process in this case manifested an improper exercise in spot zoning, rather than a detailed analysis leading to the designation of a specific building or buildings as historic landmarks. The municipal respondents counter that the different, respective, decisions of the Landmarks Preservation Commission and the Board of Estimate, were based on exhaustive studies and reports, as well as public discussion on notice, and that the final vote of the Board of Estimate, although accomplished expeditiously, was not simply expediently arrived at and was supported by a rational basis.

The present challenge is both for a declaratory judgment, invoking the constitutional challenge, and on Article 78 grounds (*see generally*) Morris, *New York Practice Guide: Land Use Regulation* (Matthew Bender, 1988), Vol. 2, Sec. 17.05(3)(b)(vi)(A). The Landmarks Law seeks to protect those buildings, structures and landscape features which have a special character or have special historic or esthetic interest or value. The statutory vehicle for protection is either a designation as landmarks or their inclusion within historic districts. There is a distinction between the criteria for designation of an individual landmark or an interior landmark, on the one hand, and the criteria for designation of an historic district, on the other hand. (*Id.*, *at* Sec. 17.05(3)(b)(vii)(B), (C)).

In December of 1967, the Board of Estimate approved the City Planning Commission's proposal to create a special theatre district, to protect the district from the expansion of midtown construction. The Special District roughly approximated the Times Square area. The City Planning Commission sought to encourage the construction of new theatre space in newly constructed building by giving a bonus with respect to the utilization of space. The city as well as the State Office of Parks, Recreation and Historic Preservation, entered a memorandum of agreement with the federal government which required the city to begin consideration of landmark status for theatre buildings within the Broadway theatre district. The Landmarks Preservation Commission selected 35 theatres

for potential designation, which included the 22 theatres relevant to this appeal. The municipal authorities took heed of the public outcry following the demolition of the Helen Hayes and Morosco Theatres in 1982 and subsequently, the midtown zoning amendments to the Zoning Resolution targeted Broadway theatres to enhance their preservation. The zoning amendment continued the space use bonuses for construction of new theatres, and gave bonuses for the rehabilitation of specified theatres. Special permits for demolition were required as to 44 listed theatres.

The Landmarks Preservation Commission calendared public hearings to consider the designation of 45 Broadway theatres. These were scheduled in June of 1982, to allow preparation of reports on the historical, cultural, and architectural significance of the individual theatres. Respondents contend that the petitioners received individual notice and offered testimony. While not required as part of the process, Community Board 5 eventually voted in favor of landmark designation for all of the listed theatres. The record was kept open for additional comments and petitioners' architect submitted a report, analyzing the listed theatres. From April 21, 1984 through January 5, 1988, the Landmarks Preservation Commission held 29 public executive sessions for consideration of the subject designations. On August 6, 1985, the Commission designated exteriors and/or interiors of three theatres as landmarks.

In December of 1985, and March of 1987, respectively, the Landmarks Preservation Commission compiled two reports on preservation of the Broadway theatres and guide lines therefor. The record shows that the Landmarks Preservation Commission consistently received copious materials from numerous sources emphasizing the unique qualities, as set forth by the statutory criteria, relevant to each theatre. There is also evidence that at many of the executive sessions, a staff member would present the cultural, historical, architectural, and/or aesthetic value of each of the listed theatres. Further, a 35-to-40-page designation report was prepared for each building. Each theatre was then addressed, in alphabetical order, at public executive sessions commencing November 4,

1987. Respondents note that again petitioners were given notice and attended the meetings. Between November 4, 1987 and January 5, 1988, the Landmarks Commission designated the interior and exterior of nineteen of the listed theatres, the interior of 7 theatres, and the exterior of 2 more theatres. Thirteen theatres were not designated during this process. Of the 28 designated theatres, petitioners own 22; of the 13 non-designated theatres, petitioners own 10. Within five business days of each designation, the Landmarks Preservation Commission filed the designation reports with the Board of Estimate. After a public hearing, the Board of Estimate ratified the designations of all of the listed theatres in a single vote. Respondents note that this practice of a single vote on related matters has been the usual procedure of the Board of Estimate since 1950, and is the norm for approving or disapproving landmark designations.

After the Board of Estimate approved these matters, in October of 1987, the Landmarks Preservation Commission issued 47 landmark designations for 28 theatres, in alphabetical order, which gave rise to the present action. (Some theatres are landmarked as to interior as well as exterior).

Petitioners assert that the landmark designations, both interior and exterior, have had detrimental effects on the owners' ability to adapt theatres to changing productions and changing times. They also submit there is a cost factor borne by the owners, in keeping up the theatres, and by producers who use the landmarked theatres.

Further, petitioners attack the voting procedure of the Board of Estimate when, in approving these designations, it exercised a single roll-call vote. Petitioners argue that these are separate structures with no common architectural style and thus the single roll-call vote underscores their contention that the purpose was to preserve the theatre industry by means of sham designations. Petitioners note the boilerplate introduction to the description and analysis in each report for each theatre, as bearing untoward uniformity. Petitioners also emphasize their contention that this was protection of an industry, rather than of individual buildings, by noting that those theatres within the theatre subdistrict which were not

landmarked were not currently in use as legitimate theatres, or otherwise were protected from demolition. Further, petitioners argue that the aesthetic, cultural, and architectural attributes of the landmarked, and the nonlandmarked theatres are essentially indistinguishable.

Petitioners then challenge the procedure in Supreme Court where the court refused to hold an evidentiary hearing. The hearing, characterized as evidentiary, would have inquired into whether the Board of Estimate followed routine procedure in having a single roll-call vote. However, on appeal, petitioners argue that an evidentiary hearing would have inquired into whether evidence existed that the City was seeking to regulate the theatre industry as a whole, in violation of the mandates of the various agencies.

This court is circumscribed by the scope of judicial review of administrative determinations. It is well established that the court may not substitute its judgment for that of the administrative body (*see generally*, with respect to landmarks, *Matter of Society for Ethical Culture* v. *Spatt*, 68 A.D.2d 112 (1st Dept. 1979), *aff'd*, 51 N.Y.2d 449). This Court has already noted the particular expertise of the members of the Landmarks Preservation Commission *supra*, at 117; accord, *Matter of Committee to Save the Beacon Theatre* v. *City of New York*, 146 A.D.2d 397, 405 [1st Dept. 1989]). Considering the wealth of analyses and reports, as well as anecdotal testimony, provided to the Landmarks Preservation Commission prior to the subject designations, it appears to be beyond serious challenge that a reasonable basis existed for the designations as to each theatre, upon a consideration of the statutory criteria.

There is no basis to argue that the proposals were "railroaded" through the Landmarks Preservation Commission; the preliminary analyses and reports were exhaustive, the decision making occurred over the course of several years. Three days of public hearings simply concluded the input into the decision making, and the final decisions do not appear to have been arrived at with any great dispatch. While petitioners complain of the limited time allowed to them for comments before the Board of Estimate, there is no indication

that they were deprived of a meaningful opportunity to submit their own reports or comments prior to the Board of Estimate hearing, particularly at the Landmarks Preservation Commission phase of proceedings.

Further, there is criticism by petitioners of the single roll call vote by the Board of Estimate. But, the Board had received individual reports, as well as the Planning Commission reports, prior to the Board of Estimate hearing. Finally, in this regard, we note, as mentioned above, that since the 1950's the Board had routinely entertained a single vote on similar matters, particularly those involving zoning and landmark designations.

Manipulation of the Landmarks Law by the Landmarks Commission only for the purpose of preserving the Broadway theatre industry, rather than individual theatres, would have been improper (*see* Landmarks Law [Admin. Code] § 25-304 subd. a). Such a practice would misconstrue zoning matters for landmark matters. However, notwithstanding the district within which the theatres stand, the designation proceedings addressed the exteriors and/or interiors of the specific buildings in terms of the criteria of the Landmarks Law. (*See generally Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 133; *affg.* 42 N.Y.2d 324, 329-330). Municipal respondents point out that the Landmarks Preservation Commission has designated theatres which are located outside of the Broadway District, such as the Apollo, the Beacon, City Center, Carnegie Hall, and Town Hall, on the basis of the same statutory criteria. This is further evidence that the Landmarks Commission was not seeking to protect the Broadway theatre industry by sham designations.

Accordingly, we agree with the nisi prius court that the administrative determination was based on substantive evidence, was not arbitrary and capricious and did not violate the law.

With respect to the constitutional challenge, the *Penn Central* case, *supra*, established the constitutionality of the Landmarks Law. Petitioner's challenge, that *Penn Central* is not controlling since it did not address the method of designation is without merit. *Penn Central* involved the alteration of a

landmark, a restriction which arises out of the designation. Since the Supreme Court in *Penn Central* (*supra*, 438 U.S. at 138) clearly ruled that the application of the Landmarks Law does not affect a taking of the property, the constitutional challenge thereby is resolved. Further, under the standards set forth in *Spears* v. *Berle* (48 N.Y.2d 254, 263) and *Honore de St. Aubin* v. *Flacke* (68 N.Y.2d 66, 76), the petitioners have not carried their burden of demonstrating that the Landmarks Law as applied to these particular theatres denies them essential use of their property.

Finally, with respect to the constitutional argument, the scheme of law embodied in the Landmarks Act serves a legitimate purpose of saving historical landmarks (*see Seawall Associates* v. *City of New York*, 74 N.Y.2d 92, 112, *cert. den.* ____ U.S. ____, 110 S. Ct. 500 [1989]). With respect to any claim that petitioners are deprived of any economic use of their property, in the absence of final agency action on applications by petitioners for renovations or alterations, the matter is not ripe for review (*Church of St. Paul and St. Andrew v. Barwick*, 67 N.Y.2d 510 *at* 520; *see* permit provisions for alternations or demolitions in Landmarks Law [Admin. Code] §§ 25-306, 25-307). In the meantime, there is no prohibition against petitioners receiving economic benefit from continuing the use of the buildings as theatres (accord, *Penn Central*, *supra*, at 136). In any event, transferable development rights inure to the owners of these buildings, which, absent a successful challenge, must be presumed to have economic benefit. We note that some of petitioners, in fact, have made use of these transferable developmental rights.

Petitioners also challenge the provision of the Zoning Resolution (Zoning Resolution § 81-742) which requires listed theatres to obtain a special permit from the City Planning Commission for demolition. This, of course, is a zoning matter, rather than a landmark matter. Petitioner bears the heavy burden of demonstrating the unconstitutionality of the zoning ordinance (*Robert E. Kurzius, Inc.* v. *Incorporated Vil. of Upper Brookville*, 51 N.Y.2d 338, 344) and discriminatory effects of a statute will not render the statute invalid

if there exists a reasonable basis (*Lighthouse Shores* v. *Town of Islip*, 41 N.Y.2d 7, 12). There is no evidence that this provision is not based on a comprehensive plan and, as municipal defendants point out, similar demolition permits are required by the Zoning Resolution in several other special districts.

Finally, considering the narrow scope of review available to the court below, it cannot be said that with the volumes of documentary evidence in the record and supporting affidavits, that there was a need to conduct an evidentiary hearing to examine whether the Board of Estimate's voting mechanism was arbitrary and capricious, or in violation of law. Since the court was not empowered to substitute its own judgment for that of the administrative body, the only inquiry was whether the record, as submitted, supported the voting procedure and the determination. We agree that it did.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Irma Vidal Santaella, J.), entered February 6, 1990, which denied petitioners' motion for summary judgment, granted summary judgment to municipal respondents, and dismissed the petition and complaint, should be affirmed, without costs or disbursements.

All concur.

Opinion of New York Supreme Court, New York County dated December 5, 1989 (Unreported)

SUPREME COURT: NEW YORK COUNTY
INDIVIDUAL ASSIGNMENT PART 35

Index No. 12587/88

IN RE: SHUBERT ORGANIZATION, INC., *et al.*,

Petitioners,

—against—

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

HON. IRMA VIDAL SANTAELLA

Petitioners bring this combined action and proceeding, pursuant to Articles 30 and 78 of the CPLR, for a judgment 1) declaring void and vacating each landmark designation of twenty-two individual theatre buildings, 2) declaring invalid the Special Demolition Permit requirement, 3) declaring the Landmarks Preservation Law ("Landmarks Law") void and 4) remanding the matter of theatre preservation to respondents for further consideration.

Petitioners, other than The League of American Theatres and Producers, Inc. (a trade association representing the interests of theatre owners and producers), own one or more of the theatres in issue:

Theatre	*Address*
Barrymore	243-251 W. 47th Street, N.Y., N.Y.
Martin Beck	302-314 W. 45th Street, N.Y., N.Y.
Belasco	111 W. 44th Street, N.Y., N.Y.
Booth	222-232 W. 45th Street, N.Y., N.Y.

Theatre	*Address* (Cont.)
Brook Atkinson	256-262 W. 47th Street, N.Y., N.Y.
Broadhurst	235-243 W. 44th Street, N.Y., N.Y.
Cort	138-146 W. 48th Street, N.Y., N.Y.
Forty Sixth Street	226-236 W. 46th Street, N.Y., N.Y.
Golden	252-256 W. 45th Street, N.Y., N.Y.
Mark Hellinger	217-239 W. 51st Street, N.Y., N.Y.
Imperial	249 W. 45th Street, N.Y., N.Y.
Longacre	220 W. 48th Street, N.Y., N.Y.
Lunt-Fontanne	203-217 W. 46th Street, N.Y., N.Y.
Lyceum	149-157 W. 45th Street, N.Y., N.Y.
Majestic	245-257 W. 44th Street, N.Y., N.Y.
Music Box	239-247 W. 57th Street, N.Y., N.Y.
Eugene O'Neill	230-238 W. 49th Street, N.Y., N.Y.
Plymouth	236 W. 45th Street, N.Y., N.Y.
Royale	242-250 W. 45th Street, N.Y., N.Y.
St. James	246-256 W. 44th Street, N.Y., N.Y.
Shubert	221-233 W. 44th Street, N.Y., N.Y.
Winter Garden	1634-1646 Broadway, N.Y., N.Y.

Respondents are the Landmarks Preservation Commission ("LPC"), the City Planning Commission ("CPC"), the Board of Estimate ("BOE") and the City of New York.

Save the Theatres, Inc., Actors' Equity Association, Society of Stage Directors and Choreographers, United Scenic Artists Local 829, Dramatist Guild, National Trust for Historic Preservation in the United States, New York Landmarks Conservancy, Inc., Municipal Arts Society and the National Center for Preservation Law have intervened as *amici curiae* urging dismissal.

The petition and complaint, as amended (the "petition") sets forth eleven causes of action. The first cause alleges the BOE and LPC exceeded their powers under the Landmarks Law (New York City Administrative Code Title 25 Chapter 3) and the landmark designations were arbitrary, capricious, an abuse of discretion and illegal as unauthorized under the New York City Charter, the Landmarks Law and its enabling legislation, General Municipal Law ("GML") Article 5 Section 96-A.

The second cause alleges BOE violated the Landmarks Law, GML 96-A, general principles of due process and administrative law and its own practices regarding designations of landmarks and were arbitrary, capricious, an abuse of discretion and illegal in that BOE failed to consider each individual building on its own merits and in voting by means of a single roll call vote to approve LPC's designation of twenty-eight individual theatre buildings on March 10, 1988.

The third cause alleges the LPC and/or the BOE violated the Landmarks Law, GML 96-A, general principles of due process and administrative law by failing to have a transcript of the public hearings held in 1982 at the time when LPC designated the buildings as landmarks and/or when the BOE voted to approve the designations.

As a fourth cause, petitioners allege the designations insofar as they included theatre interiors constituted unreasonable governmental interference with the essential need for prompt and cost-efficient accommodation of interior facilities to the varying and distinct needs of changing theatre productions and were arbitrary, capricious and an abuse of discretion.

As a fifth cause, petitioners allege respondents' failure to determine the environmental significance of the designations was arbitrary, capricious, an abuse of discretion and illegal rendering the designations void since under the State Environmental Quality Review Act ("SEQRA") (Environmental Conservation Law Article 8 ["ECL"]), the designations are "actions" which may have a significant effect on the environment in New York City.

The sixth cause alleges the landmarks law is unconstitutional on its face insofar as its exemption for properties not making a reasonable return is insufficient and unreasonable because its hardship provision [25-309) is inadequate.

The seventh, eighth and ninth causes allege the listed theatres which have not been landmarked are subject to the Special Demolition Permit requirement which is ultra vires and void as New York City Zoning Resolution 81-742 ("ZR") is beyond the powers vested in the CPC; is illegal and unconstitutional on its face as it places a disproportionate burden of preserving the theatre industry solely upon the owners of

property with theatres rather than upon all property owners in Midtown Theatre Subdistricts and fails to provide a hardship exemption.

The tenth cause alleges the designations constitute a "taking" of property without just compensation in violation of petitioners' substantive and procedural due process and equal protection rights under the state and federal constitutions.

The eleventh cause alleges damages, to be proved at trial, of not less than $200,000,000.

Respondents have served their amended answers and have interposed a combined total of fifteen affirmative defenses requesting dismissal of the petition and complaint.

In their first defense, respondents LPC, BOE and the City of New York allege the LPC's determination to designate each of the subject theatres was reasonable, is not arbitrary and capricious as it is fully supported by the record submitted herein; the second, the LPC's determination to designate each of the subject theatres was made on an individual basis, not in a wholesale fashion as each theatre was designated on its own individual merit and not as an industry; the third, the landmark designations were effectuated by LPC and approved by the BOE in accordance with applicable Due Process standards and that petitioners were given notice and opportunity to be heard at every stage of the designation process; the fourth, LPC's adoption of Guidelines for the Treatment of Designated Broadway Theatre Exteriors and Interiors is a valid exercise of LPC's regulatory power to assist in the preservation of landmarks; the fifth, the subject landmark designations are not subject to the State Environmental Quality Review Act (SEQRA) and City Environmental Quality Review (CEQR) and that the designation process is exempt from these environmental provisions because the designation of a building as a landmark is not an "action" within SEQRA and CEQR; the sixth, petitioners have no standing to raise environmental claims because they only raise claims of economic damage in the petition.

In the seventh, respondents contend that the hardship provision of the Landmarks Law (Section 25-309) is constitutional and valid, and in the eighth and ninth, respondents

allege that petitioners' challenge to the constitutionality of the hardship provision and landmark designations is premature as no hardship application has been filed. Neither has any application for any permit of demolition or certificate of alteration been made by petitioners.

In the tenth, respondents allege petitioners' claim of an unconstitutional taking of their properties without just compensation by virtue of landmark designations is premature as they have not yet suffered a specific hardship or availed themselves of statutory methods to be relieved of any such alleged hardship. In the eleventh, LPC, BOE and the City allege petitioners have not been hindered in the continued use of their properties as theatres and therefore, the designations of the subject theatres as landmarks does not constitute an unconstitutional taking.

Respondent CPC interposes four affirmative defenses in its amended answer:

In the first, CPC alleges the Special Demolition Permit ("SDP") (ZR Section 81-742) is not ultra vires; the second, that SDP is constitutional and lawful in all respects; the third, that review of the SDP is premature; and the fourth, that all respondents have worked in accordance with a comprehensive zoning plan to preserve the character of the Theatre District.

By notice of motion, dated December 5, 1988, petitioners have moved for summary judgment (CPLR 3212) granting the relief sought in their petition. By notice of cross-motion, dated December 6, 1988, respondents have moved to dismiss the petition (CPLR 7804(f)) and the complaint (CPLR 3211) or for summary judgment (CPLR 3212).

It is noted that while these motions were noticed prior to service of the amended pleadings, the essential allegations and defenses remain substantially the same. The need for the amendment was recognized by the parties and the Court when respondents first learned that the stenographer's notes of the public hearing held in 1982 before the LPC had not been destroyed (as originally thought) but were located and made available for transcription. The transcript is now made part of this record. The pleadings, as amended, include two

new claims and related defenses. The first claim, relates to the absence of the transcript before the LPC and the BOE. The second relates to the BOE's method of voting on the landmark designations.

Now, the motion and cross-motion are considered together with oral arguments by all parties made before the Court prior to and at the time of final submission on June 15, 1989. Additional submissions were received as late as August 2, 1989.

In their amended petition and complaint, verified May 1989, petitioners allege:

> "The City of New York engaged in an ill-conceived and shortsighted effort to preserve the Broadway theatre industry, has taken drastic and illegal action to prevent the demolition or alteration of buildings currently housing legitimate theatre. The Landmarks Preservation Commission, proceeding in alphabetical order by theatre name, has designated as a landmark virtually every building located in the Broadway Theatre District currently in use as a legitimate theatre. In parallel fashion, the City Planning Commission has created a list of legitimate theatres and prohibited their demolition by enacting discriminatory demolition requirements should landmark restrictions not apply.
>
> The City's actions threaten to stultify rather than revitalize legitimate theatre in the Broadway Theatre District. The restrictions were imposed without a proper plan in utter disregard of the economic realities of the Broadway theatre industry. The theatre owners and producers—whose continued economic vitality is central to the health of Broadway theatre—have been precluded from sharing in the economic growth of the west side of Midtown, and have had the greater part of the value of their theatre properties taken from them. Additionally, the landmarks restrictions prevent the owners and producers from incorporating state-of-the art technologies in their theatres, and adapting their theatres to the scenic and structural demands of various productions,

unless the interiors are restored to their previous condition at enormous costs.

The restrictions the City had adopted to achieve its goals are plainly unauthorized by the state legislation establishing the City's powers to enact landmark and zoning restrictions. The wholesale landmark designations were made as part of a pre-conceived plan to landmark the theatre industry, without a good faith individual assessment of the aesthetic, historic and cultural merit of each structure. By imposing discriminatory and onerous burdens on the theatre owners, the City has violated fundamental notions of fairness, Due Process, and Equal Protection under the Federal and State Constitutions. Further, the City's actions were taken in complete derogation of the provisions of state law requiring governmental officials to determine whether their actions may have a significant impact on the physical environment, which includes existing patterns of neighborhood growth and development and community character.

While petitioners, who own and operate the theatre properties in issue, have not sought to demolish a theatre in twenty years and have no present intent to do so, the City's illegal actions should nonetheless be annulled, and the City should be required to re-think and re-examine its approach to preserving the Broadway theatre industry consistent with government principles of law."

Respondents' position is petitioners' claims are not ripe for review, the landmark designations and zoning resolution are proper, the environmental laws do not apply, there have been no due process or equal protection violations and there has been no unconstitutional "taking" of property.

The voluminous record herein includes the following excerpt which compromises a comprehensive history of Broadway theatre:

"The theatre industry is crucial to the cultural and financial life of the city. Tourism is New York's number one nonmanufacturing industry. In 1986, seventeen mil-

lion visitors brought $2.5 billion dollars into the city and tax revenues of $265 million. Of these visitors, nearly half came to the city primarily for cultural purposes. And it is the Broadway theatre that holds first place on the list of cultural attractions. Seeing a Broadway show is the single most important reason why tourists visit New York City. The Broadway theatre outdraws all other cultural and sporting events. Over seven million Broadway theatre tickets were sold in 1986-87 season. Thirty-seven thousand persons are employed as actors, stage hands, technicians, writers, etc. The area around Times Square provides support services to the theatre industry—shops, restaurants, hotels, customers, rehearsal halls, music and taxis.

The Broadway Theatre District is the largest and most famous concentration of legitimate stage theatres in the world. The Broadway theatre shares an important role in the development of theatre within the City of New York and dramatic arts in America. The Broadway Theatres were constructed during the first thirty years of this century, a time when the Theatre industry within New York City was undergoing a fertile period of rebirth. At the turn of the century, the Theatre business moved into what was then known as "Long Acre Square", now known as Times Square. Having moved gradually northward all during the 19th century, New York's theatre district finally came to rest at Time Square, where it has remained for almost ninety years.

All of the subject theatres were built between 1901 and 1927, years when the City experienced its single most fertile period of theatre construction. This burgeoning growth of the theatre Industry in the Times Square area coincided with a number of developments which coalesced to heighten the importance of that area as a major hub of the City. That steady evolution of the City's transportation system, ever focused on the Times Square area, made that a prime location of Theatre entertainment.

In addition, at the turn of the century, the method of presenting a play was undergoing a fundamental change. The "stock system" whereby actors worked in one theatre for a season in a variety of plays was replaced by the "combination system" under which a company of actors appearing in a single show would tour from city to city. Important to the viability of the combination system was a single location to cast, rehearse and develop a show for a cross-country tour. New York became the headquarters for the combination system.

The construction of the Broadway Theatres, was an important development in the City's cultural history as a center for theatre entertainment. In addition, this ongoing period of theatre building witnesses an evolution of theatre design and architecture. The increase of theatre construction after the turn of the century gave rise to a new attitude in design from the 19th century style to the 20th century style of fan-shaped seating, fewer balconies and a lower and wider proscenium. Seventy-two theatres were constructed in New York City shortly before and shortly after World War I. From the time of the depression until the 1960's no new playhouses were constructed.

Because the subject theatres were built at a time when New York was the springboard for theatre performance and architecture, these theatres set the tone for theatre construction throughout the country, because productions launched in New York required similar accommodation in other cities. Thus, the subject theatres participated in and by their very existence demonstrate the rich cultural and historical heritage of the City of New York and of the nation.

The playhouses still standing in the Broadway Theatre District share among them over eighty years of American theatrical history. It was in the Broadway Theatres that the beginning of a distinctly American drama could be seen. On Broadway in the 1920's the work of a new generation of playwrights was seen—Eugene O'Neill,

> Maxwell Anderson, George S. Kaufman, and others. In the 1930's the Broadway theatre produced work of political and social concern written by Lillian Hellman, Robert Sherwood, and Thornton Wilder. In the 1940's and 50's Tennessee Williams, Arthur Miller and William Inge wrote for the Broadway stage. Meanwhile, musical comedy had blossomed into a uniquely American art form, producing the works of Rogers and Hammerstein, Cole Porter, Irving Berlin, Jerome Kern and many others.

A factual background is as follows:

In 1967, the BOE approved CPC's proposal to establish the Special Theatre District in response to a threat to the theatre industry posed by the expansion westward of Midtown office construction. This was the first of many Special Districts in the City. Developers were induced to include legitimate theatres in new office buildings by granting the Highest Floor Area Ratio ("FAR") allowed. Since 1967, five new theatres have been building in the Special Theatre District.

In the mid 1970's a proposal by the City to revitalize Time Square included building a major hotel at Broadway and 45th Street. The project then known as the Portman Hotel (now the Marriott-Marquis Hotel) was subject to the National Historic Preservation Act of 1966 (16 U.S.C. 470(f)), as amended 90 Stat. 320 (the "Act") because financing was to be supplied, in part, by the federal government. The Helen Hayes and Morosco theatres occupied the Portman Hotel site. Under the Act, the City had to determine if these theatres were eligible for inclusion in the National Register of Historic Places. The Helen Hayes Theatre was found eligible and the City was required to find ways to mitigate adverse effects of the proposed demolition.

In 1978, the LPC began a preliminary study of the west side of Midtown Manhattan, including the Broadway Theatre District, to identify buildings potentially worthy of landmark status. Initially, LPC listed thirty-five theatres ("listed theatres") for further consideration.

In 1979, an agreement was entered between the Federal Advisory Council on Historic Preservation and the City in conjunction with the New York State Office of Parks, Recreation and Historic Preservation to take "reasonable and appropriate measures to locate, identify and preserve significant buildings" in New York City. The agreement provided "where appropriate, the process of landmarking . . . will be initiated." Also in 1979, CPC considered rezoning in midtown Manhattan to encourage more real estate development on the west side by increasing the allowable bulk of new buildings.

In March 1982, the Helen Hayes and Morosco Theatres were razed in the midst of public demonstrations which led to an outpouring of public concern by the citizenry at large for the safety of other theatres. On May 13, 1982, Midtown zoning amendments to the Zoning Resolution were passed. The amendments included special provisions relating to Broadway theatres—the Special Regulations for Theatre Subdistrict. (ZR 81-70). The purpose of the regulations was "to preserve and protect the character of the theatre subdistrict as a cultural and theatrical showcase." (ZR 81-71). Floor Area Ratio ("FAR") bonuses were also given for rehabilitation of certain listed theatres. (ZR 81-745). Other provisions were utilized to help preserve the character of the area as an entertainment center. (ZR 81-721, 722 and 723). LPC added nine more theatres to the original list of thirty-five for a total of 44 listed theatres. To demolish a listed theatre, the owner was required to meet certain criteria and obtain a Special Demolition Permit from CPC. (ZR 81-742). Transfer of unused Development Rights (air rights above existing buildings) is regulated by the Zoning Resolution. The 1982 Zoning Resolution amendments included a provision which benefited listed theatres only. If certain conditions are met, transferable development rights ("TDR" 's) may be used in a manner not otherwise permitted. To qualify for this benefit, the theatre owner must agree to the continued use of the building as a legitimate theatre. (ZR 81-743). Four theatres have already benefited from the transfer of their TDR's under ZR 81-743. The four theatres, The Belasco, The Lyceum, The Palace and

The Ritz, are all owned by petitioners. Owners of landmark buildings are given benefits not available to owners of non-landmark buildings. (See ZR 74-79, 711 and 712). Certain additional benefits are given to owners of theatre buildings designated as landmarks. (See ZR 81-747, 747(a), 747(b)).

With respect to the issues at hand, the record shows that on April 12, 1982, LPC voted to calendar the listed theatres for a public hearing to consider landmark designations. The owners of all listed theatres received notice. The hearings were held on June 14 and 15, 1982. At the request of petitioners and Community Board No. 5, the public hearing was continued on October 19, 1982 so petitioners could submit their reports on the historical, cultural and architectural significance of each building under consideration. (Petitioners subsequently commissioned a second report which was submitted to LPC.) Prior to and during the course of hearings LPC received numerous letters from members of the theatre industry, local and national figures, politicians and the general public in support of designation. Approximately 80 people testified on behalf of themselves or membership organizations. Reports on the architectural, historical, cultural and aesthetic importance of the theatres were submitted to LPC by a number of groups. Petitioners received advance notice of the hearings to be held and appeared and participated fully. Petitioners commissioned and submitted reports for consideration by LPC.

The ZR required the Mayor of the City of New York to appoint a Theatre Advisory Council ("TAC") including a chairperson, and representatives of the performing arts, the theatrical industry and related professions to advise the CPC concerning applications for special permits or certifications pursuant to ZR 81-74. TAC was appointed and met 40 times from July 1982 to May 1984. TAC had 15 members including theatre owners, representatives of the community and of theatre unions, a theatre historian, a real estate developer, architects and lawyers. In June 1984, the Theatre Advisory Council issued its report titled "To Preserve The Broadway Theatre." The report unabashedly stated its goal was the preservation of all 44 (now 45) listed theatres for legitimate

theatre use. The report made a number of recommendations regarding interior landmark designations, permanency of the prohibition against demolition of any listed theatre, zoning changes, encouragement of theatre-related uses and covenants for preservation of theatres, and the use of bonuses. CPC adopted these recommendations in a three phase comprehensive plan. Other recommendations regarding certain real estate tax relief and creation of a theatre trust have not been adopted by CPC but implementation has been proposed by the Mayor's Office. The proposed Theatre Trust would be a not-for-profit organization with a board of professional people and experts in the theatre industry. The Trust would lease and operate a number of theatres including those owned by petitioners. The owners would be relieved of the cost of maintaining these theatres. A production company would be established to develop and produce new dramatic plays, to assist playwrights and reduce the costs of tickets for the public. The proposed tax relief would apply to listed theatres not used one-third or more of the year and would reduce property tax within a range from about $160,000 to $525,000.

After the public hearings were concluded the LPC held 29 public executive sessions for further consideration and review of each theatre for possible designation. These sessions began on April 12, 1984 and concluded on January 5, 1988.

In August 1985 LPC voted to designate three theatres as landmarks. These designations were submitted to the BOE for final consideration. The BOE asked that LPC make its decisions on all listed theatres and present them to BOE at the same time rather than individually.

On March 10, 1988, the BOE held a public hearing on LPC's designations. After the public hearing in which petitioners participated, the BOE approved LPC's designations.

The Landmarks Law (New York City Administrative Code 25-301 et. seq.) was enacted to protect historic buildings and neighborhoods from precipitous decisions to destroy or change their character.

"§ 25-301 PURPOSE AND DECLARATION OF PUBLIC POLICY

A. The Council finds that many improvements, as herein defined, and landscape features, as herein defined, having a special character or a special historical or aesthetic interest or value and many improvements representing the finest architectural products of distinct periods in the history of the city, have been uprooted, notwithstanding the feasibility of preserving and continuing the use of such improvements and landscape features, and without adequate consideration of the irreplacable loss to the people of the city of the aesthetic, cultural and historic values represented by such improvements and landscape features. In addition, distinct areas may be similarly uprooted or may have their distinctiveness destroyed, although the preservation thereof may be both feasible and desirable. It is the sense of the council that the standing of this city as a world wide tourist center and world capital of business, culture and government cannot be maintained or enhanced by disregarding the historical and architectural heritage of the city and by countenancing the destruction of such cultural assets.

B. It is hereby declared as a matter of public policy that the protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historical or aesthetic interest of value is a public necessity and is required in the interests of the health, prosperity, safety and welfare of the people. The purpose of this chapter is to (a) effect and accomplish the protection, enhancement and perpetuation of such improvements and landscape features and of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history; (b) safeguard the city's historic, aesthetic and cultural heritage, as embodied and reflected in such improvements, landscape features and districts; (c) stabilize and improve property values in such districts; (d) foster civic

pride in the beauty and noble accomplishments of the past; (e) protect and enhance the city's attractions to tourists and visitors and the support and stimulus to business and industry thereby provided; (f) strengthen the economy of the city; and (g) promote the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.

A landmark is defined as:

> "Any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development heritage or cultural characteristics of the City, State or Nation, and which has been designated as a landmark pursuant to the provisions of this chapter." [25-302(n)].

The New York City Charter Section 534 established the LPC to include eleven members with at least three architects, one qualified historian, one city planner or landscape architect and one realtor. The LPC is responsible for carrying out the provisions of the Landmarks Law. The LPC has the power, after a public hearing, to designate a landmark, landmark sites, interior landmarks, scenic landmarks and historic districts. (Landmarks Law 25-303). Notice of public hearings are to be given as provided in Landmarks Law Section 25-313. After any such designation the LPC must file a copy of its designating report with the BPE, CPC and other city agencies. (Landmarks Law 25303(4)(f)). The BPE may notify or disapprove such designation. (Landmarks Law 25-303(4)(g)(2)).

After the BOE acts, the owner may seek judicial review of any final designation decision. Owners of landmarks must keep them "in good repair" (Landmarks Law 25-311) and seek approval from the LPC for proposed alterations or improvements (Landmarks Law 25-305).

The issues presented on judicial review are whether respondents proceeded in excess of jurisdiction, whether respon-

dents' determinations were made in violation of lawful procedure, were affected by an error of law or were arbitrary and capricious or an abuse of discretion and whether any of petitioners' constitutional rights have been violated. Upon careful examination of the entire record, the Court finds the amended petition and complaint lacking in merit and grants respondents' cross-motion in its entirety. Thus, petitioners' motion must be denied as moot. Petitioners' rather conclusory assertions that respondents' actions were, *inter alia*, "ill conceived", "shortsighted", "drastic and illegal", "plainly unauthorized" and "onerous" are in sharp contrast with the contents of the record.

As a threshold matter, the petitioners' claims are ripe for review because the petitioners' papers present facial attacks on various provisions of the Landmarks Preservation Law and the amendments to the New York City Zoning Resolution.

Addressing the eleven causes of action seriatim: Petitioners have not met their burden of proof on the first cause of action by showing the landmark designations were arbitrary or capricious or had no rational basis. Judicial review is limited to whether there is a rational basis for the determination in issue. (*Matter of Pell* v. *Board of Education*, 34 N.Y.2d 222; *Society for Ethical Culture in the City of New York* v. *Spatt*, 68 A.D.2d 112, *aff'd*, 51 N.Y.2d 449). The Court's function is complete once a reasonable basis in fact is found in the entire record. (*300 Gramatan Avenue Assoc.* v. *Div. of Human Rights*, 45 N.Y.2d 176). A reviewing Court may annul a discretionary determination of an administrative body only if the determination is illegal, arbitrary or capricious. (*Corliss* v. *Solomon*, 75 A.D.2d 837). The court may not substitute its own findings or judgment for that of the agency. (*See Newbrand* v. *City of Yonkers*, 285 N.Y. 164; *Zeidler* v. *Board of Supervisors of Suffolk Co.*, 35 A.D.2d 54). The court need not agree with the agency as long as there is factual support in the record for the agency's determination. *Matter of Phinn* v. *Kross*, 8 A.D.2d 132).

Here, the record (over 7,000 pages) is replete with testimonial, photographic and documentary evidence attesting to the

special architectural, aesthetic, historical and cultural value in the designated aspects of each landmarked theatre. Petitioners allege "The landmark designations were made pursuant to a predetermined policy to landmark each and every legitimate theatre in Midtown which had any potential for development, without regard to the applicable standards under the Landmarks Law." While it is true the Theatre Advisory Council desired to preserve all listed theatres, there is no probative evidence that was the goal of any agency named as a respondent herein. To the contrary, the record shows each theatre building was given individual consideration of its unique features and history thought to merit protection. Not all theatres were found to permit protection and on some, only interior or exterior features were found to be of such special character or special historical or aesthetic interest or value as to warrant protection. The rest were rejected. Notwithstanding, the goals and recommendations of the Theatre Advisory Counsel, petitioners' blanket claims are unsupported.

Moreover, there is no support for petitioners' claim that respondents have exceeded their statutory authority. The record provides support for finding each building was designated on its own merits not *en masse* as claimed. If there were evidence that respondents sought to control the theatre industry as a whole, clearly the agencies would have violated their mandates.

In the second cause of action, petitioners allege various violations by the BOE. Again, however, the record does not support the claims. As noted, the record again supports a finding each building was considered separately on its own interior and exterior features. Petitioners complain the buildings were simply listed alphabetically and considered as a group. Obviously, the theatres were listed alphabetically to avoid confusion and as an aid to a more efficient and logical review.

The single roll call vote procedure by the BOE appears to have been a matter of administrative discretion and convenience. The BOE was entitled to vote on the designations as a group providing there is no prejudice to petitioners. Petitioners have not shown any prejudice or violation of any law or

rule concerning the voting methods at BOE. There is no requirement that individual votes be taken on each matter before the BOE. Petitioners have not produced any support for the allegation that their rights were violated. Respondents show by example how a single vote is a simple expedient in the face of busy calendars.

The third cause of action relating to the absence of the transcript is without merit. While the public hearings before the LPC were mandated by law, there is no statutory requirement that testimony at the hearings be transcribed. The stenographer's notes were made in case a private party or reviewing party or court required a transcript of the hearings. Members of each commission or the BOE could have requested transcripts but instead chose to consider and rely on other evidence and reports made available and provided to them. There is no statutory provision specifying exactly what evidence must be considered by each agency except Landmarks Law 25-303(4)(f) which provides only that the LPC shall file a copy of its designating report with each agency involved.

Petitioners' interests and concerns were presented at every stage of the proceedings by their chosen representatives. Petitioners should not be heard to complain that the process took as long as it did or that members of the commissions have changed over time. Petitioners themselves were, in great part, responsible for the length of the proceedings. The record shows petitioners requested continuations and adjournments so that they might have additional time to prepare reports or present evidence. Further, there is nothing in any statute that requires members of LPC, CPC, or BOE to remain the same throughout the course of proceedings. If such were the same, no agency could act effectively as membership tends to change for personal and professional reasons. It is, however, each individuals' responsibility as a member of a commission to educate and inform himself or herself on the details of the business before them so they make informed decisions. Members of each commission had numerous reports and other evidence before them before they voted. Just because certain members did not attend the public hearing is not enough to

invalidate the work of the commission provided there was a quorum.

Petitioners challenge the interior designations in their fourth cause of action as arbitrary, capricious, an abuse of discretion and illegal. The Landmarks Law specifically authorizes the LPC to designate interior architectural features as landmarks. Petitioners argue the interior designations are counterproductive to preservation and constitute an unreasonable interference with theatre productions. Petitioners' experts with eminent credentials in the field of theatre and stage design, express their opinions that the interior designations and regulations are incompatible with the requirements of good and efficient theatre and stage design. Respondents' experts, equally well-qualified in their field, express their view that interior landmarks and regulations are compatible with good theatre and stage design. Respondents cite the theatre production of "Cats", "Starlight Express" and "Phantom of the Opera" as examples of how old theatres may be modified under the interior guidelines to accommodate the latest advances in theatre/stage design requirements. Even if this Court were to agree with petitioners' experts, this Court may not substitute its judgment for that of the reviewing agency absent a finding of arbitrariness or capriciousness or the agency's action was in violation of lawful procedures or made in excess of jurisdiction. (*Carroll* v. *Ortiz*, 122 Misc. 2d 164 and *Minerva* v. *Ward*, 101 A.D.2d 754, *aff'd*, 63 N.Y.2d 739). Here, review of the record reveals a rational basis for the respondents' determination to landmark certain theatre interiors. As with the exterior designations, the record reveals each interior designation was considered individually on its own merits.

The Guidelines for the Treatment of Designated Broadway Theatres Exteriors and Interiors adopted by LPC after a number of public executive sessions was a valid exercise of its regulatory power to assist in the preservation of landmarks. The Guidelines were the result of years of study and discussion involving various experts familiar with theatrical requirements. Theatre owners were involved. The Theatre Advisory Council which also included theatre owners, recommended

the Guidelines and that the designations not be approved until the Guidelines were in place. Certain petitioners testified for the Guidelines which provide a simplified procedure and time limits for processing applications to do certain kinds of work. There is nothing arbitrary, abusive or illegal in the Guidelines.

The the fifth cause of action regarding SEQRA is without merit. The Environmental Conservation Law 8-0109(2) ("ECL") provides, in relevant part, "all agencies . . . shall prepare . . . an environmental impact statement on any action they propose or approve which may have a significant effect on the environment."

To argue as petitioners do, the designation of one or more buildings as landmarks constitutes an "action" which may have a significant effect on the environment, overlooks the fact that landmark designations effectively act to stabilize the environment in and about a building and its neighborhood. By maintaining the existing structure, no change is effected. The environment is unaffected.

Landmark designations are not "actions" within the purview of ECL but enjoy exemption from the ECL definition of "action". ECL 8-0105(5) provides "actions" do not include: (III) maintenance or repair involving no substantial changes in existing structure of facility." Insofar as the Landmarks Law seeks only to maintain the status quo of a designated building through routine maintenance and repairs, SEQRA has no application to the subject designations.

The sixth cause of action alleging the Landmarks Law is unconstitutional for failure to exempt properties not making a reasonable return is without merit. Petitioners challenge the so-called hardship provision (Landmarks Law 25-309) which permits demolition, alteration or reconstruction on the ground of insufficient return. Petitioners argue the hardship provision is inadequate to prevent a confiscation of a landmark owner's property. Petitioners' argument erroneously presupposes a landmark designation is equivalent to a confiscation or "taking". Petitioners cite cases for the proposition that land use regulations which prevent a reasonable return or investment are confiscatory. Petitioners rely primarily

upon *Seawall Associates* v. *City of New York* (138 Misc. 2d 96) wherein the trial court held enactment of Local Law 9 of 1987 was unconstitutional as a "taking" of property. Although reversed on appeal to the Appellate Division (142 A.D.2d 72) the trial court was subsequently reinstated by the Court of Appeals (74 N.Y.2d 92 (cert. denied)) in a decision dated July 6, 1989. Local Law 9 involved a broad affirmative social action program designed to "freeze" existing single room occupancy rental units ("SRO") to help remedy the growing problem of homelessness. The law prohibited conversion, alteration or demolition of SRO units. Owners were required to rehabilitate units in their buildings and lease each such unit at a controlled rent. Substantial penalties were provided for violations. An exemption provision allowed owners, at a cost of $45,000 per unit, to convert or eliminate a unit. The cost to "buy" an exemption could be decreased upon a finding of hardship if "there is no reasonable possibility that such owners can make a reasonable rate of return" which was defined as a net annual return of 8-1/2% of the assessed value of the property as an SRO. The Court of Appeals found Local Law 9 unconstitutional as a *per se* physical "taking" without compensation "because it interfere[s] so drastically with the SRO property owners' fundamental rights to possess and to exclude. The law requires nothing less of the owners than 'to suffer the physical occupation of [their] building[s] by third parties' [citations omitted]" [74 N.Y.2d 92, 106]. The court also found even if there was no physical "taking", Local Law 9 "would still be facially invalid as a regulatory taking." Citing *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, the Court of Appeals stated:

> "There is no 'set formula' for determining in all cases when an adjustment of rights has reached the point when 'justice and fairness' require that compensation be paid. It is basic, however, that such a burdenshifting regulation of the use of private property will, without more, constitute a taking: (1) if it denies an owner eco-

> nomically viable use of his property, or (2) if it does not substantially advance legitimate state interests."

Also relevant here, the Court of Appeals stated:

> "The effect of Local Law No. 9 is unlike that of the Landmarks Law in Penn Central, which denied the owner of Grand Central neither the continued full use of its property nor a reasonable return on its investment."

As a footnote the Court of Appeals stated:

> "Moreover, the [Supreme] Court in *Penn Central* pointed out that, while the Landmarks Commission had denied an application to build more than 50 stories above the terminal, there was no showing that permission to build fewer would be denied. Additionally, the Court noted that Penn Central had not been deprived of all pre-existing air rights, since under the law these rights were transferable (438 U.S. 104, 136-137)."

The point here is, *Seawall* and *Penn Central* do not support petitioners' argument that the Landmarks Law and the hardship provision in particular are confiscatory in denying a reasonable return to the owner. The Court of Appeals expressly differentiated the effect of a use regulation such as Local Law 9 versus a landmark designation. Whereas a regulation affecting use of the property may result in an unlawful "taking", a landmark designation denies the owner "neither the continued full use of its property nor a reasonable return."

It was not the hardship provision or the rate that rendered Local Law 9 invalid. In *Seawall*, the trial court found, *inter alia*, Local Law 9

> "so onerous a burden on the property regulated and in effect deprives the owner of a reasonable income or other private use of his property thereby destroying its economic value, a regulation of this type amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid."

Therefore, to argue as petitioners do that because the 8-1/2% hardship provision under Local Law 9 was unconstitutional, the 6% hardship provision under the Landmarks Law must also be unconstitutional, overlooks the legal import of Seawall.

The seventh, eighth and ninth causes of action challenging the Special Demolition Permit Requirement ("SDP") in ZR 81-742 are without merit. The Zoning Resolution provides:

> "81-742 Restrictions on Demolition of Theatres.
>
> No demolition permit shall be issued by the Department of Buildings for any theatre listed in this section as a "listed theatre," unless:
>
> (a) It is an unsafe building and demolition is required pursuant to the provisions of Section 26-235 to 26-243 (Title 26, Chapter 1, Article 8. Unsafe Buildings and Property); or
>
> (b) It has been designated a landmark by the Landmark Preservation Commission and a notice to proceed has been issued to the owner pursuant to Section 25-309 of the Administrative Code permitting demolition that contemplates removal of the theatre from theatre use; or
>
> (c) The City Planning Commission, by special permit after public notice and hearing and subject to Board of Estimate action permits its demolition upon making the following findings:
>
> (1) That demolition of the theatre structure will not unduly diminish the character of the Theatre District as a cultural, entertainment and theatrical showcase, taking into consideration any or all of the following factors:
>
> (i) Current physical characteristics of the theatre that affect its suitability as a legitimate theatre, including but not limited to seating capacity, configuration and location,
>
> (ii) History of its use as a legitimate theatre presenting legitimate attractions to the general public,

(iii) Likelihood of its future use for legitimate theatre production under reasonable terms and conditions generally prevailing in the theatre industry, and

(iv) Applicant's plans, if any, for replacement of the theatre structure with a development containing replacement uses supportive of the character of the theatre subdistrict, and

(2) That there exists a legal commitment binding upon all parties in interest of the zoning lot containing the theatre that any development or enlargement on a zoning lot containing a portion or all of the former site of the listed theatre shall reserve floor space at least equivalent in amount to the total floor area of the theatre devoted exclusively to uses described in Section 81725 (entertainment related uses) and meeting the requirements of Section 81-724 (requirements for entertainment-related uses) for the lift of such development or enlargement. If the area of the zoning lot containing the theatre is less than 20,000 square feet and the Commission finds that the allocation of floor space at least equivalent in amount to the total floor area of the theatre to uses described in Section 81-725 (entertainment-related uses) is impractical or unreasonable, the Commission may authorize a reduction in the amount of area allocated to such uses. Any development or enlargement on a zoning lot containing a portion or all of the former site of a listed theatre musts, however, meet the requirements of Section 81724 (requirements for entertainment-related uses), whether or not the zoning lot is located within the area described in that Section.

The theatre to which the provisions of this section apply are predominantly free standing theatres with full stage and wings and are identified as listed theatres in Table 1 below. (See Exhibit A).

In the case of an existing legitimate theatre for whose construction bonus floor area was granted pursuant to

regulations in effect prior to the effective date of this amendment; no provision of this amendment shall be construed as changing any previously existing responsibility of the owner or lessee of such theatre for continuance of its use as a legitimate theatre."

Petitioners assert that SPD is an unauthorized use of police power and not permitted under city and state law, and should be invalidated because it is discriminatory in nature and fails to exempt properties not yielding a fair return. Petitioners argue that General City Law 20(25), the source from which the city derives its zoning powers, does not authorize the CPC to enact the SDP because it is a "site specific" zoning regulation, "isolating specific buildings in a district for different treatment from other similarly situated buildings." Petitioners state there is no authority to single out 44 parcels by name and subject them to special zoning requirements. Petitioners concede the preservation of Broadway theatres in midtown "constitutes a viable public goal" but suggest "such goal cannot be achieved by fiat" but by other means such as by equal restrictions on all owners of property in the Theatre Subdistrict promoting theatre use on their property, by enacting voluntary incentive programs or by purchase from the owners at fair market value. Petitioners conclude "whether characterized as reverse spot zoning, discriminatory zoning or frustration of property rights, the City's SDP is impermissible and should be annulled."

In support of these arguments petitioners rely primarily upon three cases—*Vernon Park Realty, Inc.* v. *City of Mount Vernon*, 307 N.Y. 493; *Westwood Forest Estates* v. *Village of South Nyack*, 23 N.Y.2d 424 and *Fred F. French Investing Co.* v. *City of New York*, 39 N.Y.2d 587, *cert. denied*, 429 U.S. 990. Upon review of these cases, however, the Court finds they are inapposite and thus not controlling on any of the three arguments against the SDP.

Vernon Park involved a parcel of land adjacent to a railroad station in the middle of a heavily developed business district. The property had always been used for parking even though the property itself was residentially zoned. Both the

business and residential districts were pursuant to 1927 zoning ordinances. Parking was permitted as a valid nonconforming use. In 1932 a variance was granted permitting installation of a gasoline station. In 1951, plaintiff took title and was denied a variance for a retail shopping center under the 1927 zoning ordinance (residential). While an action to annul the 1927 zoning ordinance was pending, the City of Mount Vernon amended the zoning ordinance to prohibit the use of plaintiff's property for any purpose other than for a service station and parking. Plaintiff proved the property had no value for residential use and that the amendment effectively destroyed the greater part of the value of the property for which it was most readily adapted—a business use. In Vernon Park, the Court of Appeals found the zoning ordinance invalid because it was "so unreasonable and arbitrary as to constitute an invasion of property rights contrary to constitutional due process. . . ."

Westwood involved a zoning ordinance amendment barring new construction of multiple dwellings throughout the Village of South Nyack in order to alleviate an existing burden on the Village's sewage disposal plant. The Court of Appeals found the amendment invalid because it was not properly related to zoning purposes and restricted the owner's property to a use fo which it was not adaptable. The Court also found the amendment was not adopted in furtherance of a comprehensive plan.

Fred F. French Investing involved an amendment to the New York City Zoning Resolution purporting to create a "special park district", reasoned two private parks in a midtown residential complex then zoned for residential and office building use, exclusively for use as parks open to the public and granted the owner certain development rights which could be transferred to some other unspecified parcel. The Court of Appeals found the amendment unconstitutional as an unreasonable exercise of the police power to regulate private property use without due process of law because it deprived the owner of all property rights except bare title and certain other dubious rights.

In each of these three cases, the invalidated zoning measures were found to have denied the owners the full or value of their properties, that the proposed measures were not properly related to zoning purposes or not adopted in furtherance of a comprehensive zoning plan. Another case cited by petitioners is *De Sena* v. *Gulde*, 24 A.D.2d 165, wherein an amendment to a village zoning ordinance placed plaintiff's and an adjoining property into a light manufacturing district pursuant to a preexisting master plan. Because of boycotting, picketing and threats of economic damage by certain members of the community who sought to make race an issue out of the zoning amendment, the Board of Trustees adopted another amendment placing the same area into a residential district. The subsequent amendment was declared illegal because the Board failed to follow its own master plan or its conviction as to the most appropriate use of the land.

Here, the CPC has in place a comprehensive plan for the theatre district first created in 1967. The plan was enacted in three phases and adopted by the BOE on February 5, 1987, October 29, 1987 and April 28, 1988. Phase I applied to certain zoning lots and regulates lighting, signs and lowscale street walls with building set backs. (ZR 88-723, 732 and 81-75). These provisions were designed to preserve the scale and low density in the core area of Broadway consistent with preserving the character of the area as an entertainment related area. (See ZR 81-00(h)). In order to encourage preservation of existing theatres, Phase II discontinued the bonuses provided earlier to attract construction of new theatres. To ensure continuity in the character of the area, new developments were required to reserve a certain floor area for entertainment related use. A new development might not have to reserve floor area for entertainment uses if the new development was in a merged zoning lot with a theatre. (See ZR 81-722, 721 and 725).

The SDP (ZR 81-742) was included in ZR 81-74, which had been enacted in 1982 then extended and modified and later made permanent. An environmental review by the City was conducted as part of the adoption of these provisions. The review resulted in the issuance of a Certificate of No Effect

or negative declaration, dated April 20, 1987, as revised September 2, 1987. A public hearing (July 8, 1987) before the CPC was held after Community Board No. 5 approved the provision on June 11, 1986. A CPC report (September 2, 1987) recommended these provisions be made permanent. On October 29, 1987 the BOE adopted them.

All of the provisions in ZR 81-72 to 81-74 were made permanent under Phase II. These provisions, originally adopted in 1982, include those which are beneficial to theatre owners such as a bonus for rehabilitation of listed theatres (ZR 81745), the allowance for relocation of bulk across zoning district lines (ZR 81-746), the transfer of interior-only landmark TDRs (ZR 81-747(a)) and the transfer of TDRs through a common chain of ownership (ZR 81-747(b)). Some theatre owners have already benefited from some of these provisions. They only challenge the restriction on demolition.

The SDP applies only to listed theatres not designated a landmark. Respondents point out as a practical matter, there are only three theatres, the Broadway, the Nederlander and the Ritz, that are subject to the special demolition permit procedure and because the Broadway and the Ritz have already sold their TDRs, the SDP is not much of a restriction on them. The Nederlander remains as the only theatre restricted by the SDP. Petitioners do not deny respondents' analysis narrowing the application of the SDP to three theatres and ultimately to the Nederlander. Since its enactment in 1982, no theatre owner has ever applied for a special demolition permit and no applications are pending consistent with petitioners' representation they have no present intent to demolish any of their theatres.

The record also shows special permits for demolition are required in other special districts and each requires satisfaction of particular criteria.

Respondents cite *Asian Americans for Equality* v. *Koch*, (72 N.Y.2d 121) where, in upholding the Special Manhattan Bridge District, the Court of Appeals stated, among other things, special district zoning "can be used as an incentive to further growth and development of the community rather than as a restraint" and "is one of several imaginative legis-

lative schemes intended to encourage, or even coerce, private development into making the city a more pleasant and efficient place to live and work." The Court noted that by use of special district incentive plans, the city has "encouraged the preservation and development of the Broadway Theatre District," among others.

Where legislation is challenged the Court must decide "only whether the means chosen are constitutional and related to the evil sought to be abolished" and not "whether the legislature has chosen the best remedy. . . ." (*Staten Island Loaders* v. *Waterfront Commission*, 117 F.Supp. 308, *aff'd* 347 U.S. 439). If legislation enacted pursuant to a state's police power bears a rational relationship to a legitimate government interest, it will be upheld. (*United States* v. *Carolen Products Co.*, 304 U.S. 144; *Grossman* v. *Baumgartner*, 17 N.Y.2d 345).

In *Kravetz* v. *Plenge*, 84 A.D.2d 422, the Appellate Division, Fourth Department, stated:

> "Spot zoning is the singling out of a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of the property and to the detriment of the other owners [citations omitted]. Where the enacting authority acts in accordance with a comprehensive plan it will not be condemned as spot zoning, even though it singles out and affects but one lot or creates a small area in the center of a larger zone devoted to a different use [citations omitted]." (At 428).

In *Penn Central*, *supra*, the U.S. Supreme Court stated:

> "It is time, as appellants emphasize, that both historic district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels. But, contrary to appellant's suggestions, landmark laws are not like discriminatory, or 'reverse spot' zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment other than the

> neighboring ones. [citation omitted]. In contrast to discriminatory zoning, which is the anithesis of land use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the City. . . ." (At 132)

There is no spot zoning, reverse spot zoning or discriminatory zoning here. There is no "arbitrary singling out of a particular parcel for different less favorable treatment than the neighboring ones." GCL 20(24) provides "such regulations shall be uniform for each class of buildings throughout any district, but the regulations in one or more districts may differ from those in other districts."

Petitioners' reply memorandum correctly recognizes that the cases cited by respondents involved and upheld zoning restrictions imposed on classes of structures treating similarly situated parcels in a uniform fashion. The record here shows the listed theatres share a sufficiently common heritage, architecturally, historically, culturally and aesthetically as to be fairly viewed as a class of buildings in the Special Theatre District.

There is a limited scope of review applicable to municipal zoning ordinances (*See Kurzius, Inc.* v. *Upper Brookville*, 51 N.Y.2d 338; *Town of Huntington* v. *Park Shore Country Day Camp*, 47 N.Y.2d 61) which are given a strong presumption of constitutionality. Moreover, there is a heavy burden on the challenger to rebut the presumption by demonstrating unconstitutionality beyond a reasonable doubt. (*Asian American* v. *Koch*, *supra*).

There can be no question but that the City has a comprehensive plan and that preservation of the character of the Special Theatre District is an appropriate planning objective. Economic considerations and goals are within the bounds of legitimate government interests. (*See Matter of Wolfsohn* v. *Burden*, 211 N.Y. 288 and *Walkbroadway Realty Inc.* v. *New York Board of Standards and Appeals*, Sup. Ct. N.Y. Co., Index #25071/82, July 3, 1985). The City is legislatively endowed with the power "to regulate and limit the height,

bulk and location of buildings hereafter erected" (GCL 20(24)) and "to regulate and restrict the location of trades and industries and the location of buildings, designed for specified uses, and for said purpose to divide the City into districts and to prescribe for each such district the trades and industries that shall be excluded or subjected to special regulation and the uses for which buildings may not be erected or altered" (GCL 20(25)).

Commendably, petitioners have no present intent to demolish any of their theatres and they agree preservation is a viable public goal. The record reveals, however, that petitioners concerns are all related to the economics of their investments. Indeed, petitioners suggest other means by which they think the City might achieve its goals with less of a burden on them. While property owners cannot be faulted for wanting less regulation it is not this Court's prerogative to fulfill those wishes absent a demonstration of a violation of rights. No such violation has been found on this record. The SDP is only one element of the zoning resolution amendments applicable to the Special Theatre District. The Court finds, as it must, the SDP promotes and conserves the most desirable use for land in the Special Theatre District in accordance with City's well-considered, comprehensive, master plan. Therefore, the SDP is not an unauthorized use of the police power and is permitted under City and State law and is not discriminatory zoning.

The argument the SDP fails to include a hardship provision to exempt property not yielding a fair return is of no avail. Pursuant to ZR 72-01(B), the Board of Standards and Appeals ("BSA") has the power to "hear, decide and determine in a specific case of practical difficulties or unnecessary hardship, whether to vary the application of the provisions of this resolution". A hardship provision need not be spelled out in each chapter of the zoning resolution as the BSA has the authority to grant a variance from the Special Demolition Permit requirements under ZR 72-21. In addition, there is evidence in the record that petitioners requested there be only one hardship hearing at LPC. Therefore, petitioners may apply for hardship relief from the SDP at either the LPC or

the BSA notwithstanding the absence of such right in ZR 81-742.

The tenth cause of action is without merit. On the issue of a "taking" without just compensation, *Penn Central* and *Seawall* are controlling authority. In *Penn Central*, Justice Brennan stated:

> "The question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a 'taking' requiring the payment of 'just compensation.'."

The question was answered in the affirmative. The grant of landmark status does not effect a "taking." The designations of petitioners' theatre contemplate a continuity of use as theatres. Petitioners are nevertheless free to change the uses to which their buildings may be put. The Landmarks Law does not concern itself with use so long as the use will not adversely affect the protected architectural features.

Petitioners have not distinguished the relevant facts in this case from those in *Penn Central.* Instead, petitioners argue respondents' citation to *Penn Central* is unnecessary because petitioners do not question the City's police power to preserve buildings through landmarking procedures. Further, petitioners state the Landmarks Law should not be invalidated simply because it inhibits development or improvement of private property nor that it strips all value from petitioners' property. What petitioners contend is that there must be a "causal relationship" between the Landmark Law and the police power goal. Petitioners maintain this "causal relationship" requirement is mandated by GML 96-A and *Nollan* v. *California Coastal Commission*, 197 S. Ct. 3141. Petitioners conclude their argument by alleging "respondents cannot satisfy the strict causal relationship test required in Nollan. . .".

GML 96-A requires that measures in "the exercise of police power, shall be reasonable and appropriate to the pur-

pose, or if constituting a "taking" of private property shall provide for due compensation, which may include the limitation or remission of taxes". In *Nollan*, the U.S. Supreme Court stated:

> "We have long recognized that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land,' *Agins* v. *Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106 (1980). *See also Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 127, 98 S. Ct. 2646, 2660, 57 L. Ed. 2d 631 (1978) ("A use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose. Our cases have not elaborated on the standards for determining what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." (*Id.* at 3147)

Continuing, the *Nollan* court stated that "a broad range of governmental purposes and regulations satisfies these requirements." One such example was *Penn Central* wherein the Court did a thorough analysis of the Landmarks Law in New York and rejected a claim of "taking". The Court found the regulation substantially advanced a legitimate state interest of preserving Grand Central Terminal. Therefore, however the 'test' in *Nollan* may be defined, *Penn Central* held that the New York Landmarks Law met the test. A fortiori, the "reasonable and appropriate" test in GML 96-A is also met.

This Court finds that preservation of certain theatres and the industry of theatre production in the Special Theatre District in New York City is a legitimate government interest which is substantially advanced by the Landmarks Law. The theatre industry in New York is an integral part of the American cultural fabric and the economy of New York City and State. Reference is here made to the declaration of public policy set forth in Landmarks Law 25-301(b). It clearly states that the protection and perpetuation of improvements of special character or special historical or aesthetic interest or

value is a public necessity required in the interest of the health, prosperity, safety and welfare of the people. The purpose of the policy is expressly set forth and includes fostering civic pride in the beauty and noble accomplishments of the past, the protection and enhancement of the City's attractions to tourists and visitors and the support and simulus to business and industry thereby provided, to strengthen the economy of the City and to promote the use of historic district landmarks and interior landmarks for the education, pleasure and welfare of the people.

The eleventh cause of action alleges damages of not less than $200,000,000. Alleging it does not make it so. No evidentiary proof is offered to show a genuine issue of fact. No factual allegations are found in the pleadings to support this cause of action. It is not clear to the Court whether this claim of damage is asserted in relation to the "taking" argument or as a separate claim for diminished value of air rights. No probative evidence is offered to show diminution of such rights or the value thereof. Conclusory arguments have no merit and are insufficient to defeat respondents' cross-motion for summary judgment.

Contrary to petitioners' arguments respondents have presented an affidavit directly refuting petitioners' allegations with a factual analysis of air rights in connection with petitioners' properties. The analysis lists the permitted FAR, the allowable bulk, approximate existing bulk and unused residual bulk for each of twenty theatres owned by petitioners. The factual statements in the affidavit belie petitioners' conclusions. No issue of fact is found to defeat the cross-motion relative to the eleventh cause of action.

Accordingly, respondents' cross-motion for dismissal is granted.

Settle Order and Judgment in accordance with the foregoing decision.

Dated: December 5, 1989

/s/ I.V. Santaella
J.S.C.

New York Court of Appeals
Dismissal of Appeal

Sept. 10, 1991
(Reported at 78 N.Y.2d 1006, 580 N.E.2d 1059, 575 N.Y.S.2d 456)

APPEALS ON CONSTITUTIONAL GROUNDS
Decided September 10, 1991

Shubert Org., Inc., Matter of,

v.

Landmarks Preservation Commn. of City of N.Y.
. . . (1st Dept.: 166 A.D.2d 115) . . . appeal dismissed

New York Court of Appeals
Denial of Leave to Appeal

December 18, 1991
(Reported at ____ N.Y.2d ____, ____ N.E.2d ____, ____ N.Y.S.2d ____)

MOTIONS
Decided December 18, 1991

1200. MATTER OF THE SHUBERT ORGANIZATION, INC., ap. (Landmarks Preservation Commission of the City of New York, res)—Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction expenses. Judge Kaye took no part.

NEW YORK CITY LANDMARKS LAW
New York City Administrative Code, Title 25, Chapter 3

Chapter 3

LANDMARKS PRESERVATION AND HISTORIC DISTRICTS

§ 25-301 Purpose and declaration of public policy.
§ 25-302 Definitions.
§ 25-303 Establishment of landmarks, landmark sites, interior landmarks, scenic landmarks and historic districts.
§ 25-304 Scope of commission's powers.
§ 25-305 Regulation of construction, reconstruction, alternations and demolition.
§ 25-306 Determination of request for certificate of no effect on protected architectural features.
§ 25-307 Factors governing issuance of certificate of appropriateness.
§ 25-308 Procedure for determination of request for certificate of appropriateness.
§ 25-309 Request for certificate of appropriateness authorizing demolition, alterations or reconstruction on ground of insufficient return.
§ 25-310 Regulation of minor work.
§ 25-311 Maintenance and repair of improvements.
§ 25-312 Remedying of dangerous conditions.
§ 25-313 Public hearings; conferences.
§ 25-314 Extension of time for action by commission.
§ 25-315 Determinations of the commission; notice thereof.
§ 25-316 Transmission of certificates and applications to proper city agency.
§ 25-317 Penalties for violations; enforcement.
§ 25-318 Reports by commission on plans for proposed projects.
§ 25-319 Regulations.
§ 25-320 Investigations and reports.
§ 25-321 Applicability.

§ 25-301 Purpose and declaration of public policy. a. The council finds that many improvements, as herein defined, and landscape features, as herein defined, having a special character or a special historical or aesthetic interest or value and many improvements representing the finest architectural products of distinct periods in the history of the city, have been uprooted, notwithstanding the feasibility of preserving and continuing the use of such improvements and landscape features, and without adequate consideration of the irreplaceable loss to the people of the city of the aesthetic, cultural and historic values represented by such improvements and landscape features. In addition, distinct areas may be similarly uprooted or may have their distinctiveness destroyed, although the preservation thereof may be both feasible and desirable. It is the sense of the council that the standing of this city as a world wide tourist center and world capital of business, culture and government cannot be maintained or enhanced by disregarding the historical and architectural heritage of the city and by countenancing the destruction of such cultural assets.

b. It is hereby declared as a matter of public policy that the protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of health, prosperity, safety and welfare of the people. The purpose of this chapter is to (a) effect and accomplish the protection, enhancement and perpetuation of such improvements and landscape features and of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history; (b) safeguard the city's historic, aesthetic and cultural heritage, as embodied and reflected in such improvements, landscape features and districts; (c) stabilize and improve property values in such districts; (d) foster civic pride in the beauty and noble accomplishments of the past; (e) protect and enhance the city's attractions and industry thereby provided; (f) strengthen the economy of the city; and (g) promote the use of historic districts, landmarks, interior

landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.

§ 25-302 Definitions. As used in this chapter, the following terms shall mean and include:

a. "Alteration." Any of the acts defined as an alteration by the building code of the city.

b. "Appropriate protective interest." Any right or interest in or title to an improvement parcel or any part thereof, including, but not limited to, fee title and scenic or other easements, the acquisition of which by the city is determined by the commission to be necessary and appropriate for the effectuation of the purpose of this chapter.

c. "Capable of earning a reasonable return." Having the capacity, under reasonably efficient and prudent management, of earning a reasonable return. For the purposes of this chapter, the net annual return, as defined in subparagraph (a) of paragraph three of subdivision v of this section, yielded by an improvement parcel during the test year, as defined in subparagraph (b) of such paragraph, shall be presumed to be the earning capacity of such improvement parcel, in the absence of substantial grounds for a contrary determination by the commission.

d. "City-aided project." Any physical betterment of real property, which:

(1) may not be constructed or effected without the approval of one or more officers or agencies of the city; and

(2) upon completion, will be owned in whole or in part by any person other than the city; and

(3) is planned to be constructed or effected, in whole or in part, with any form of aid furnished by the city (other than under this chapter), including, but not limited to, any loan, grant, subsidy or the mode of financial assistance, exercise of the city's powers of eminent domain, contribution of

city property, or the granting of tax exemption or tax abatement; and

(4) will involve the construction, reconstruction, alteration or demolition of any improvement in a historic district or of a landmark.

e. "Commission." The landmarks preservation commission.

f. "Day." Any day other than a Saturday, Sunday or legal holiday; provided, however, that for the purposes of subdivision d of section 25-317 of this chapter, the term "day" shall mean every day in the week.

g. "Exterior architectural feature." The architectural style, design, general arrangement and components of all of the outer surfaces of an improvement, as distinguished from the interior surfaces enclosed by said exterior surfaces, including, but not limited to, the kind, color and texture of the building material and the type and style of all windows, doors, lights, signs and other fixtures appurtenant to such improvement.

h. "Historic district." Any area which:

(1) contains improvements which:

(a) have a special character or special historical or aesthetic interest or value; and

(b) represent one or more periods or styles of architecture typical of one or more eras in the history of the city; and

(c) cause such area, by reason of such factors, to constitute a distinct section of the city; and

(2) has been designated as a historic district pursuant to the provisions of this chapter.

i. "Improvement." Any building, structure, place, work of art or other object constituting a physical betterment of real property, or any part of such betterment.

j. "Improvement parcel." The unit of real property which (1) includes a physical betterment constituting an improvement and the land embracing the site thereof, and (2) is treated as a single entity for the purpose of levying real estate taxes, provided however, that the term "improvement parcel" shall also include any unimproved area of land which is treated as a single entity for such tax purposes.

k. "Interior." The visible surfaces of the interior of an improvement.

l. "Interior architectural feature." The architectural style, design, general arrangement and components of an interior, including, but not limited to, the kind, color and texture of the building material and the type and style of all windows, doors, lights, signs and other fixtures appurtenant to such interior.

m. "Interior landmark." An interior, or part thereof, any part of which is thirty years old or older, and which is customarily open or accessible to the public, or to which the public is customarily invited, and which has a special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation, and which has been designated as an interior landmark pursuant to the provisions of this chapter.

n. "Landmark." Any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation, and which has been designated as a landmark pursuant to the provisions of this chapter.

o. "Landmark site." An improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site pursuant to the provisions of this chapter.

p. "Landscape feature." Any grade, body of water, stream, rock, plant, shrub, tree, path, walkway, road, plaza, fountain, sculpture or other form of natural or artificial landscaping.

q. "Minor work." Any change in, addition to or removal from the parts, elements or materials compromising an improvement, including, but not limited to, the exterior architectural features or interior architectural features thereof and, subject to and as prescribed by regulations of the commission if and when promulgated pursuant to section 25-319 of this chapter, the surfacing, resurfacing, painting, renovating, restoring or rehabilitating of the exterior architectural features or interior architectural features or the treating of the same in any manner that materially alters their appearance, where such change, addition or removal does not constitute ordinary repairs and maintenance and is of such nature that it may be lawfully effected without a permit from the department of buildings.

r. "Ordinary repairs and maintenance." Any:

(1) work done on any improvement; or

(2) replacement of any part of an improvement;

for which a permit issued by the department of buildings is not required by law, where the purpose and effect of such work or replacement is to correct any deterioration or decay of or damage to such improvement or any part thereof and to restore same, as nearly as may be practicable, to its condition prior to the occurrence of such deterioration, decay or damage.

s. "Owner." Any person or persons having such right to, title to or interest in any improvement so as to be legally entitled, upon obtaining the required permits and approvals from the city agencies having jurisdiction over building construction, to perform with respect to such property any demolition, construction, reconstruction, alteration or other work as to which such person seeks the authorization or approval of the commission pursuant to section 25-309 of this chapter.

t. "Person in charge." The person or persons possessed of the freehold of an improvement or improvement parcel or a lesser estate therein, a mortgagee or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, agent or any other person directly or indirectly in control of an improvement or improvement parcel.

u. "Protected architectural feature." Any exterior architectural feature of a landmark or any interior architectural feature of an interior landmark.

v. "Reasonable return." (1) A net annual return of six per centum of the valuation of an improvement parcel.

(2) Such valuation shall be the current assessed valuation established by the city, which is in effect at the time of the filing of the requests for a certificate of appropriateness; provided that:

(a) The commission may make a determination that the valuation of the improvement parcel is an amount from such assessed valuation where there has been a reduction in the assessed valuation for the year next preceding the effective date of the current assessed valuation in effect at the time of the filing of such request; and

(b) The commission may make a determination that the value of the improvement parcel is an amount different from the assessed valuation where there has been a bona fide sale of such parcel within the period between March fifteenth, nineteen hundred fifty-eight, and the time of the filing of such request, as a result of a transaction at arm's length, on normal financing terms, at a readily ascertainable price, and unaffected by special circumstances such as, but not limited to, a forced sale, exchange of property, package deal, wash sale or sale to a cooperative. In determining whether a sale was on normal financing terms, the commission shall give due consideration to the following factors:

(1) The ratio of the cash payment received by the seller to (a) the sales price of the improved parcel and (b) the annual gross income from such parcel;

(2) The total amount of the outstanding mortgages which are liens against the improvement parcel (including purchase money mortgages) as compared with the assessed valuation of such parcel;

(3) The ratio of the sales price to the annual gross income of the improvement parcel, with consideration given, where the improvement is subject to residential rent control, to the total amount of rent adjustments previously granted, exclusive of rent adjustments because of changes in dwelling space, services, furniture, furnishings, or equipment, major capital improvements, or substantial rehabilitation;

(4) The presence of deferred amortization in purchase money mortgages, or the assignment of such mortgages at a discount;

(5) Any other facts and circumstances surrounding such sale which, in the judgment of the commission, may have a bearing upon the question of financing.

(3) For the purposes of this subdivision v:

(a) Net annual return shall be the amount by which the earned income yielded by the improvement parcel during a test year exceeds the operating expenses of such parcel during such year, excluding mortgage interest and amortization, and excluding allowances for obsolescence and reserves, but including an allowance for depreciation of two per centum of the assessed value of the improvement, exclusive of the land, or the amount shown for depreciation of the improvement in the latest required federal income tax return, whichever is lower; provided, however, that no allowance for depreciation of the improvement shall be included where the improvement has been fully depreciated for federal income tax purposes or on the books of the owner; and

(b) Test year shall be (1) the most recent full calendar year, or (2) the owner's most recent fiscal year, or (3) any twelve consecutive months ending not more than ninety days prior to the filing (a) of the request for a certificate, or (b) of an application for a renewal of tax benefits pursuant to the provisions of section 25-309 of this chapter, as the case may be.

w. "Scenic landmark." Any landscape feature or aggregate of landscape features, any part of which is thirty years old or older, which has or have a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated a scenic landmark pursuant to the provisions of this chapter.

§ 25-203 Establishment of landmarks, landmark sites, interior landmarks, scenic landmarks and historic districts. a. For the purpose of effecting and furthering the protection, preservation, enhancement, perpetuation and use of landmarks, interior landmarks, scenic landmarks and historic districts, the commission shall have power, after a public hearing:

(1) to designate and, as herein provided in subdivision j, in order to effectuate the purposes of this chapter, to make supplemental designations as additions to, a list of landmarks which are identified by a description setting forth the general characteristics and location thereof;

(2) to designate and, in order to effectuate the purposes of this chapter, to make supplemental designations as additions to, a list of interior landmarks, not including interiors utilized as places of religious worship, which are identified by a description setting forth the general characteristics and location thereof;

(3) to designate and, in order to effectuate the purposes of this chapter, to make supplemental designations as additions to, a list of scenic landmarks, located on property owned by the city, which are identified by a description set-

ting forth the general characteristics and location thereof; and

(4) to designate historic districts and the location and boundaries thereof, and, in order to effectuate the purposes of this chapter, to designate changes in such locations and boundaries and designate additional historic districts and the location and boundaries thereof.

b. It shall be the duty of the commission, after a public hearing, to designate a landmark site for each landmark and to designate the location and boundaries of such site.

c. The commission shall have power, after a public hearing, to amend any designation made pursuant to the provisions of subdivisions a and b of this section.

d. The commission may, after a public hearing, whether at the time it designates a scenic landmark or at any time thereafter, specify the nature of any construction, reconstruction, alteration or demolition of any landscape feature which may be performed on such scenic landmark without prior issuance of a report pursuant to subdivision c of section 25-318. The commission shall have the power, after a public hearing, to amend any specification made pursuant to the provisions of this subdivision.

e. Subject to the provisions of subdivision g and h of this section, any designation or amendment of a designation made by the commission pursuant to the provisions of subdivisions a, b and c of this section shall be in full force and effect from and after the date of the adoption thereof by the commission.

f. Within five days after making any such designation or amendment thereof, the commission shall file a copy of same with the secretary of the board of estimate and with the department of buildings, the city planning commission, the board of standards and appeals, the fire department and the department of health.

g. (1) The secretary of the board of estimate, within five days after the filing of such copy with such secretary, shall refer such designation or amendment thereof to the city planning commission, which, within thirty days after such referral, shall submit to the board of estimate a report with respect to the relation of such designation or amendment thereof to the zoning resolution, projected public improvements and any plans for the development, growth, improvement or renewal of the area involved.

(2) The board of estimate may modify or disapprove such designation or amendment thereof within ninety days after a copy thereof is filed with the secretary of the board provided that the planning commission has submitted the report required by this subdivision or that thirty days have elapsed since the referral of the designation or amendment to the commission by the secretary of the board. If the board shall disapprove such designation or amendment thereof, it shall cease to be in effect on the date of such action by the board. If the board shall modify such designation or amendment thereof, such modification shall be in effect on and after the date of the adoption thereof by the board.

h. (1) The commission shall have power, after a public hearing, to adopt a resolution proposing rescission, in whole or in part, of any designation or amendment or modification thereof mentioned in the preceding subdivisions of this section. Within five days after adopting any such resolution, the commission shall file a copy thereof with the secretary of the board of estimate, who shall, within five days after such filing, refer such resolution to the city planning commission.

(2) Within thirty days after such referral, the city planning commission shall submit to the board of estimate a report with respect to the relation of such proposed rescission to the zoning resolution, projected public improvements and any plans for the development, growth, improvement, or renewal of the area involved.

(3) Such board may approve, disapprove or modify such proposed rescission within ninety days after a copy of the res-

olution proposing same is filed with the secretary of the board. If such proposed rescission is approved or modified by the board, such rescission or modification thereof shall take effect on the date of such action by the board. If such proposed rescission is disapproved by the board, or is not acted on by the board within such period of ninety days, it shall not take effect.

i. The commission may at any time make recommendations to the city planning commission with respect to amendments of the provisions of the zoning resolution applicable to improvements in historic districts.

j. All designations and supplemental designations of landmarks, landmark sites, interior landmarks, scenic landmarks and historic districts made pursuant to subdivision a shall be made pursuant to notices of public hearings given, as provided in section 25-313.

k. Upon its designation of any improvement parcel as a landmark and of any landmark site, interior landmark, scenic landmark or historic landmark or any amendment or any such designation or rescission thereof, the commission shall cause to be recorded in the office of the register of the city of New York in the county of which such landmark, interior landmark, scenic landmark or district lies, or in the case of landmarks, interior landmarks, scenic landmarks and districts in the county of Richmond in the office of the clerk of said county of Richmond, a notiee of such designation, amendment or rescission describing the party affected by, in the case of the county of Richmond, its land map block number or numbers, and its tax map, block and lot number or numbers, and in the case of all other counties, by its land map and lot number or numbers.

§ 25-304 Scope of commission's powers. a. Nothing contained in this chapter shall be construed as authorizing the commission, in acting with respect to any historic district or improvement therein, or in adopting regulations in relation thereto, to regulate or limit the height and bulk of buildings, to regulate and determine the area of yards, courts and other

open spaces, to regulate density of population or to regulate and restrict the locations of trades and industries or location of buildings designed for specific uses or to create districts for any such purpose.

b. Except as provided in subdivision a of this section, the commission may, in exercising or performing its powers, duties or functions under this chapter with respect to any improvement in a historic district or on a landmark site or containing an interior landmark, or any landscape feature of a scenic landmark, apply or impose, with respect to the construction, reconstruction, alteration, demolition or use of such improvement or landscape feature or the performance of minor work thereon, regulations, limitations, determinations or conditions which are more restrictive than those prescribed or made by or pursuant to other provisions of law applicable to such activities, work or use.

§ 25-305 Regulation of construction, reconstruction, alterations and demolition. a. (1) Except as otherwise provided in paragraph two of this subdivision a, it shall be unlawful for any person in charge of a landmark site or an improvement parcel or portion thereof located in an historic district or any part of an improvement containing an interior landmark to alter, reconstruct or demolish any improvement constituting a part of such site or constituting a part of such parcel and located within such district or containing an interior landmark, or to construct any improvement upon land embraced within such site or such parcel and located within such district, or to cause to permit any such work to be performed on such improvement or land, unless the commission has previously issued a certificate of no effect on protected architectural features, a certificate of appropriateness or a notice to proceed authorizing such work, and it shall be unlawful for any other person to perform such work or cause same to be performed, unless such certificate or notice has been previously issued.

(2) The provisions of paragraph one of this subdivision a shall not apply to any improvement mentioned in subdivision

a of section 25-318 of this chapter, or to any city-aided project, or in cases subject to the provisions of section 25-312 of this chapter.

(3) It shall be unlawful for the person in charge of any improvement or land mentioned in paragraph one of this subdivision a to maintain same or cause or permit same to be maintained in the condition created by any work in violation of the provisions of such paragraph one.

b. (1) Except in the case of any improvement mentioned in subdivision a of section 25-318 of this chapter and except in the case of a city-aided project, no application shall be approved and no permit or amended permit for the construction, reconstruction, alteration or demolition of any improvement located or to be located on a landmark site or in an historic district or containing an interior landmark shall be issued by the department of buildings, and no application shall be approved and no special permit or amended special permit for such construction, reconstruction or alteration, where required by article seven of the zoning resolution, shall be granted by the city planning commission or the board of standards and appeals, until the commission shall have issued either a certificate of no effect on protected architectural features, a certificate of appropriateness or a notice to proceed pursuant to the provisions of this chapter as an authorization for such work.

c. (1) A copy of every application or amended application for a permit to construct, reconstruct, alter or demolish any improvement located or to be located on a landmark site or in an historic district or containing an interior landmark shall, at the time of the submission of the original thereof to the department of buildings, be filed by the applicant with the commission. A copy of every application, under article seven of the zoning resolution, for a special permit for any work which includes the construction, reconstruction or alteration of any such improvement shall, at the time of the submission of such application or amended application of the

city planning commission or the board of standards and appeals, as the case may be, be filed with the commission.

(2) Every such copy of an application or amended application filed with the commission shall include plans and specifications for the work involved, or such other statement of the proposed work as would be acceptable by the department of buildings pursuant to the building code. The applicant shall furnish the commission with such other information relating to such application as the commission may from time to time require.

(3) Together with the copies of such application or amended application, every such applicant shall file with the commission a request for a certificate of no effect on protected architectural features or a certificate of appropriateness in relation to the proposed work specified in such application.

§ 25-306 Determination of request for certificate of no effect on protected architectural features. a. (1) In any case where an applicant for a permit from the department of buildings to construct, reconstruct, alter or demolish any improvement on a landmark site or in an historic district or containing an interior landmark, or an applicant for a special permit from the city planning commission or the board of standards and appeals authorizing any such work pursuant to article seven of the zoning resolution, or amendments thereof, files a copy of such application or amended application with the commission, together with a request for a certificate of no effect on protected architectural features, the commission shall determine: (a) whether the proposed work would change, destroy or affect any exterior architectural feature of the improvement on a landmark site or in an historic district or any interior architectural feature of the interior landmark upon which said work is to be done; and (b) in the case of construction of a new improvement, whether such construction would affect or not be in harmony with the external appearance of other, neighboring improvements on such site or in such district. If the commission determines

such question in the negative, it shall grant such certificate; otherwise, it shall deny such request.

(2) Within thirty days after the filing of such application and request, the commission shall either grant such certificate, or give notice to the applicant of a proposed denial of such request. Upon written demand of the applicant filed with the commission after the giving of notice of a proposed denial, the commission shall confer with the applicant. The commission shall determine the request for a certificate within thirty days after the filing of such demand. If a demand is not filed within ten days after the giving of notice of the proposed denial, the commission shall determine such request within five days after the expiration of such ten-day period.

(3) In the event of a denial of such a certificate, the applicant may file with the commission a request for a certificate of appropriateness with respect to the proposed work specified in such application.

§ 25-307 Factors governing issuance of certificate of appropriateness. a. In any case where an applicant for a permit to construct, reconstruct, alter or demolish any improvement on a landmark site, or in an historic district or containing an interior landmark, files such application with the commission together with a request for a certificate of appropriateness, and in any case where a certificate of no effect on protected architectural features is denied and the applicant thereafter, pursuant to the provisions of section 25-306 of this chapter, files a request for a certificate of appropriateness, the commission shall determine whether the proposed work would be appropriate for and consistent with the effectuation of the purposes of this chapter. If the commission's determination is in the affirmative on such question, it shall grant a certificate of appropriateness, and if the commission's determination is in the negative, it shall deny the applicant's request, except as otherwise provided in section 25-309 of this chapter.

b. (1) In making such determination with respect to any such application for a permit to construct, reconstruct, alter or demolish an improvement in an historic district, the commission shall consider (a) the effect of the proposed work in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done, and (b) the relationship between the results of such work and the exterior architectural features of other, neighboring improvements in such district.

(2) In appraising such effects and relationship, the commission shall consider, in addition to any other pertinent matters, the factors of aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color.

(3) All determinations of the commission pursuant to this subdivision b shall be made subject to the provisions of section 25-304 of this chapter, and the commission, in making any such determination, shall not apply any regulation, limitation, determination or restriction as to the height and bulk of buildings, the area of yards, courts or other open spaces, density of population, the location of trades and industries, or location of buildings designed for specific uses, other than the regulations, limitations, determinations and restrictions as to such matters prescribed or made by or pursuant to applicable provisions of law, exclusive of this chapter; provided, however, that nothing contained in such section 25-304 or in this subdivision b shall be construed as limiting the power of the commission to deny a request for a certificate of appropriateness for demolition or alteration of an improvement in an historic district (whether or not such request also seeks approval, in such certificate, of construction or reconstruction of any improvement), on the ground that such demolition or alteration would be inappropriate for and inconsistent with the effectuation of the purposes of this chapter, with due consideration for the factors hereinabove set forth in this subdivision b.

c. In making the determination referred to in subdivision a of this section with respect to any application for a permit to construct, reconstruct, alter or demolish any improvement on a landmark site, other than a landmark, the commission shall consider (1) the effects of the proposed work in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done, (2) the relationship between such exterior architectural features of the landmark, and (3) the effects of the results of such work upon the protection, enhancement, perpetuation and use of the landmark on such site. In appraising such effects and relationship, the commission shall consider, in addition to any other pertinent matters, the factors mentioned in paragraph two of subdivision b of this section.

d. In making the determination referred to in subdivision a of this section with respect to an application for a permit to alter, reconstruct or demolish a landmark, the commission shall consider the effects of the proposed work upon the protection, enhancement, perpetuation and use of the exterior architectural features of such landmark which cause it to possess a special character or special historical or aesthetic interest or value.

e. In making the determination referred to in subdivision a of this section with respect to an application for a permit to alter, reconstruct or demolish an improvement containing an interior landmark, the commission shall consider the effects of the proposed work upon the protection, enhancement, perpetuation and use of the interior architectural features of such interior landmark which cause it to possess a special character or special historical or aesthetic interest or value.

§ **25-308 Procedure for determination of request for certificate of appropriateness.** The commission shall hold a public hearing on each request for a certificate of appropriateness. Except as otherwise provided in section 25-309 of this chapter, the commission shall make its determination as to such request within ninety days after filing thereof.

§ 25-309 Request for certificate of appropriateness authorizing demolition, alterations or reconstruction on ground of insufficient return. a. (1) Except as otherwise provided in paragraph two of this subdivision a, in any case where an application for a permit to demolish any improvement located on a landmark site or in an historic district or containing an interior landmark is filed with the commission, together with a request for a certificate of appropriateness authorizing such demolition, and in any case where an application for a permit to make alterations to or reconstruct any improvement on a landmark site or containing an interior landmark is filed with the commission, and the applicant requests a certificate of appropriateness for such work, and the applicant establishes to the satisfaction of the commission that:

(a) the improvement parcel (or parcels) which include such improvement, as existing at the time of the filing of such request, is not capable of earning a reasonable return; and

(b) the owner of such improvement:

(1) in the case of an application for a permit to demolish, seeks in good faith to demolish such improvement immediately (a) for the purpose of constructing on the site thereof with reasonable promptness a new building or other income-producing facility, or (b) for the purpose of terminating the operation of the improvement at a loss; or

(2) in the case of an application for a permit to make alterations or reconstruct, seeks in good faith to alter or reconstruct such improvement, with reasonable promptness, for the purpose of increasing the return therefrom;

the commission, if it determines that the request for such certificate should be denied on the basis of the applicable standards set forth in section 25-307 of this chapter, shall, within ninety days after the filing of the request for such certificate of appropriateness, make a preliminary determination of insufficient return.

(2) In any case where any application and request for a certificate of appropriateness mentioned in paragraph one of this subdivision a is filed with the commission with respect to an improvement, the provisions of this section shall not apply to such request if the improvement parcel which includes such improvement has received, for three years next preceding the filing of such request, and at the time of such filing continues to receive, under any provision of law (other than this chapter or section four hundred fifty-eight, four hundred sixty or four hundred seventy-five of the real property tax law), exemption in whole or in part from real property taxation; provided, however, that the provisions of this section shall nevertheless apply to such request if such exemption is and has been received pursuant to section four hundred twenty-a, four hundred twenty-two, four hundred twenty-four, four hundred twenty-five, four hundred twenty-six, four hundred twenty-seven, four hundred twenty-eight, four hundred thirty, four hundred thirty-two, four hundred thirty-four, four hundred thirty-six, four hundred thirty-eight, four hundred forty, four hundred forty-two, four hundred forty-four, four hundred fifty, four hundred fifty-two, four hundred sixty-two, four hundred sixty-four, four hundred sixty-eight, four hundred seventy, four hundred seventy-two or four hundred seventy-four of the real property tax law and the applicant establishes to the satisfaction of the commission, in lieu of the requirements set forth in paragraph one of this subdivision a, that:

(a) The owner of such improvement has entered into a bona-fide agreement to sell an estate of freehold or to grant a term of at least twenty years in such improvement parcel, which agreement is subject to or contingent upon the issuance of the certificate of appropriateness or a notice to proceed;

(b) The improvement parcel which includes such improvement, as existing at the time of the filing of such request, would not, if it were not exempt in whole or in part from real property taxation, be capable of earning a reasonable return;

(c) Such improvement has ceased to be adequate, suitable or appropriate for use in carrying out both (1) the purposes of such owner to which it is devoted and (2) those purposes which it had been devoted when acquired unless such owner is not longer engaged in pursuing such purposes; and

(d) The prospective purchaser or tenant:

(1) In the case of an application for a permit to demolish seeks and intends, in good faith either to demolish such improvement immediately for the purpose of constructing on the site thereof with reasonable promptness a new building or other facility; or

(2) In the case of an application for a permit to make alterations or reconstruct, seeks and intends in good faith to alter or reconstruct such improvement, with reasonable promptness.

b. In the case of an application made pursuant to paragraph one of subdivision a of this section by an applicant not required to establish the conditions specified in paragraph two of such subdivision, as promptly as is practicable after making a preliminary determination as provided in paragraph one of such subdivision a, the commission, with the aid of such experts as it deems necessary, shall endeavor to devise, in consultation with the applicant, a plan whereby the improvement may be (1) preserved or perpetuated in such manner or form as to effectuate the purposes of this chapter, and (2) also rendered capable of earning a reasonable return.

c. Any such plan may include, but shall not be limited to, (1) granting of partial or complete tax exemption, (2) remission of taxes and (3) authorization for alterations, construction or reconstruction appropriate for and not inconsistent with the effectuation of the purposes of this chapter.

d. In any case where the commission formulates any such plan, it shall mail a copy thereof to the applicant promptly and in any event within sixty days after giving notice of its preliminary determination of insufficient return. The commission shall hold a public hearing upon such plan.

e. (1) If the commission, after holding a public hearing pursuant to subdivision d of this section, determines that a plan which it has formulated, consisting only of tax exemption and/or remission of taxes, meets the standards set forth in subdivision b of this section, as such plan was originally formulated, or with such modifications as the commission deems necessary or appropriate, the commission shall deny the request of the applicant for a certificate of appropriateness and shall approve such plan, as originally formulated, or with such modifications.

(2) Such plan, as so approved, shall set forth the extent of tax exemption and/or remission of taxes deemed necessary by the commission to meet such standards.

(3) The commission shall promptly mail a certified copy of such approved plan to the applicant and shall promptly transmit a certified copy thereof to the tax commission. Upon application made by the owner of such improvement pursuant to the provisions of paragraph five of this subdivision e, the tax commission shall grant, for the fiscal year next succeeding the date of approval of such plan, the tax exemption and/or remission of taxes provided for therein.

(4) In accordance with procedures prescribed by the regulations of the commission, it shall determine, upon application by the owner of such improvement made in advance of each such succeeding fiscal year, the amount of tax exemption and/or remission of taxes, if any, which it deems necessary, as a renewal of such plan for the ensuing year, to meet the standards set forth in subdivision b of this section, and shall promptly mail a certified copy of any approved renewal of such plan to the applicant and shall promptly transmit a certified copy of such renewal to the tax commission. Upon application made by the owner of such improvement pursuant to the provisions of paragraph five of this subdivision e, the tax commission shall grant, for such fiscal year, the tax exemption and/or remission of taxes specified in such determination.

(5) Where any such plan or a renewal thereof is approved by the commission, pursuant to the provisions of the preceding paragraphs of this subdivision e, prior to January first next preceding the first fiscal year to which the tax benefits of such plan or renewal thereof are applicable, the owner shall not be entitled to such benefits for such fiscal year unless he or she files an application therefor with the tax commission between February first and March fifteenth, both dates inclusive, next preceding such fiscal year. Where any such plan or a renewal thereof is approved by the commission between January first and June thirtieth, both dates inclusive, next preceding the fiscal year to which the tax benefits of such plan or renewal thereof are applicable, the owner shall not be entitled to such benefits for such fiscal year unless he or she files an application therefor with the tax commission on or before August first of such fiscal year.

f. (1) In any case where the commission determines, after holding a public hearing pursuant to subdivision d of this section, that a plan which it has formulated, consisting in whole or in part of any proposal other than tax exemption and/or remission of taxes, meets the standards set forth in subdivision b of this section, as such plan was originally formulated, or with such modifications as the commission deems necessary or appropriate, the commission shall approve such plan, as originally formulated, or with such modifications, and shall promptly mail a copy of same to the applicant.

(2) The owner of the improvement proposed to be benefited by such plan mentioned in paragraph one of this subdivision f may accept or reject such plan by written acceptance or rejected filed with the commission. If such an acceptance is filed, the commission shall deny the request of such applicant for a certificate of appropriateness. If a new application for a permit from the department of buildings and a new request for a certificate of appropriateness are filed, which application and request conform with such proposed plan, the commission shall grant such certificate as promptly as is practicable and in any event within thirty days after such filing.

(3) If such accepted plan consists in part of tax exemption and/or remission of taxes, the provisions of paragraphs two, three, four and five of subdivision e of this section shall govern the granting of such tax exemption and/or remission of taxes.

g. (1) Except in a case where the applicant is required to establish the conditions set forth in paragraph two of subdivision a of this section, if

(a) The commission does not formulate and mail a plan pursuant to the provisions of subdivisions b, c and d of this section within the period of time prescribed by such subdivision d; or

(b) The commission does not approve a plan pursuant to the provisions of subdivision e or f of this section within sixty days after the mailing of such plan to the applicant; or

(c) A plan approved by the commission pursuant to the provisions of paragraph one of subdivision f of this section is rejected by the owner of such improvement pursuant to the provisions of paragraph two of such subdivision;

the commission may, within ten days after expiration of the applicable period referred to in subparagraphs (a) and (b) of this paragraph one, or within ten days after the filing of a rejection of a plan pursuant to paragraph two of subdivision f of this section, as the case may be, transmit to the mayor a written recommendation that the city acquire a specified appropriate protective interest in the improvement parcel which includes the improvement with respect to which the request for a certificate of appropriateness was filed, and shall promptly notify the applicant of such action.

(2) If, within ninety days after transmission of such recommendation, or, if no such recommendation is transmitted, within ninety days after the expiration of the period herein prescribed for such transmission, the city does not:

(a) Give notice, pursuant to section three hundred eighty-two of the charter, of an application to condemn such inter-

est or any other appropriate protective interest agreed upon by the mayor and the commission; or

(b) Enter into a contract with the owner of such improvement parcel to acquire such interest, as so recommended or agreed upon;

the commission shall promptly grant, issue and forward to the owner, in lieu of the certificate of appropriateness requested by the applicant, a notice to proceed.

h. No plan which consists in whole or in part of the granting of a partial or complete tax exemption or remission of taxes pursuant to the provisions of this chapter shall be deemed to have been approved by the commission unless it is also approved by the board of estimate within the period of time prescribed by this section for approval of such plan by the commission.

i. (1) In any case where the applicant is required to establish the conditions set forth in paragraph two of subdivision a of this section, as promptly as is practicable after making a preliminary determination with respect to such conditions, as provided in paragraph one of subdivision a of this section, and within one hundred and eighty days after making such preliminary determination, the commission, alone or with the aid of such persons and agencies as it deems necessary and whose aid it is able to enlist, shall endeavor to obtain a purchaser or tenant (as the case may be) of the improvement parcel or parcels with respect to which the application has been made, which purchaser or tenant will agree, without condition or contingency relating to the issuance of a certificate of appropriateness or notice to proceed and subject to the provisions of paragraph three of this subdivision i, to purchase or acquire an interest identical with that proposed to be acquired by the prospective purchaser or tenant whose agreement is the basis of the application, on reasonably equivalent terms and conditions.

(2) The applicant shall, within a reasonable time after notice by the commission that it has obtained such a pur-

chaser or tenant, which notice shall be served within the period of one hundred and eighty days provided by paragraph one of this subdivision i, enter into such agreement to sell or lease (as the case may be) with the purchaser or tenant so obtained. Such notice shall specify a date for the execution of such agreement, which may be postponed by the commission at the request of the applicant.

(3) The provisions of this section shall not, after the consummation of such agreement, apply to such purchaser or tenant or to the heirs, successors or assigns of such purchaser or tenant.

(4) (a) If, within the one hundred eighty day period following the commission's preliminary determination pursuant to paragraph one of subdivision a of this section, the commission shall not have succeeded in obtaining a purchaser or tenant of the improvement parcel, pursuant to paragraph one of this subdivision i, or if, having obtained such a purchaser or tenant, such purchaser or tenant fails within the time provided in paragraph two of this subdivision i, to enter into the agreement provided for by such paragraph two, the commission, within twenty days after the expiration of the one hundred eighty day period provided for in paragraph one of this subdivision i, or within twenty days after the date upon which a purchaser or tenant obtained by the commission pursuant to the provisions of such paragraph one fails to enter into the agreement provided for by said paragraph, whichever of said dates later occurs, may transmit to the may a written recommendation that the city acquire a specified appropriate protective interest in the improvement parcel or parcels which include the improvement or are part of the landmark site with respect to which the request for a certificate of appropriateness was filed, and shall promptly notify the applicant of such action.

(b) If, within ninety days after transmission of such recommendation, or, if no such recommendation is transmitted, within ninety days after the expiration of the period herein prescribed for such transmission, the city does not give

notice, pursuant to section three hundred eighty-two of the charter, of an application to condemn such interest or any other appropriate protective interest agreed upon by the mayor and the commission, or does not enter into a contract with the owner of such improvement parcel to acquire such interest, as so recommended and agreed upon; the commission shall promptly grant, issue and forward to the owner, in lieu of the certificate of appropriateness requested by the applicant, a notice to proceed.

(5) Such notice to proceed shall authorize the work of demolition, alteration, and/or reconstruction sought with respect to the improvement parcel or parcels concerning which the application was made, only if such work (a) is undertaken and performed by the purchaser or tenant specified pursuant to the provisions of paragraph two of subdivision a of this section, in the application, or a bona-fide assignee, successor, lessee or sub-lessee of such purchaser or tenant (other than the owner who made application therefor), and (b) is undertaken and performed with reasonable promptness after the issuance of such notice to proceed.

§ **25-310 Regulation of minor work.** a. (1) Except as otherwise provided in section 25-312 of this chapter, it shall be unlawful for any person in charge of an improvement located on a landmark site or in an historic district or containing an interior landmark to perform any minor work thereon, or to cause or permit such work to be performed, and for any other person to perform any such work thereon or cause same to be performed, unless the commission has issued a permit, pursuant to this section, authorizing such work. (2) It shall be unlawful for any person in charge of any such improvement to maintain same or cause or permit same to be maintained in the condition created by any work done in violation of the provisions of paragraph one of this subdivision a.

b. The owner of an improvement desiring to obtain such a permit, or any person authorized by the owner to perform such work, may file with the commission an application for

such permit, which shall include such description of the proposed work, as the commission may prescribe. The applicant shall submit such other information with respect to the proposed work as the commission may from time to time require. The commission shall promptly transmit such application to the department of buildings, which shall, as promptly as practicable, certify to the commission whether a permit for such proposed work, issued by such department, is required by law. If such department certifies that such a permit is required, the commission shall deny such application, and shall promptly give notice of such determination to the applicant. If such department certifies that no such permit is required, the commission shall determine such application is hereinafter provided.

c. (1) The commission shall determine:

(a) Whether the proposed work would change, destroy or affect any exterior architectural feature of an improvement located on a landmark site or in an historic district or interior architectural feature of an improvement containing an interior landmark; and

(b) If such work would have such effect, whether judged by the standards set forth in subdivisions b, c, d an e of section 25-307 of this chapter with respect to an improvement of similar classification hereunder, such work would be appropriate for and consistent with the effectuation of the purposes of this chapter.

(2) If the commission determines the question set forth in subparagraph (a) of paragraph one of this subdivision c in the negative, or determines the question set forth in subparagraph (b) of such paragraph in the affirmative, it shall grant such permit, and it shall deny such permit if it determines such question set forth in subparagraph (a) in the affirmative and determines such question set forth in subparagraph (b) in the negative.

d. The procedure of the commission in making its determination with respect to any such application shall be as pre-

scribed in subparagraph two of subdivision a of section 25-306 of this chapter, except that any period of thirty days referred to in such subparagraph shall, for the purposes of this subdivision d, be deemed to be twenty days.

e. The provisions of this section shall be inapplicable to any improvement mentioned in subdivision a of section 25-318 of this chapter and to any city-aided project.

§ 25-311 Maintenance and repair of improvements. a. Every person in charge of an improvement on a landmark site or in an historic district shall keep in good repair (1) all of the exterior portions of such improvement and (2) all interior portions thereof which, if not so maintained, may cause or tend to cause the exterior portions of such improvement to deteriorate, decay or become damaged or otherwise to fall into a state of disrepair.

b. Every person in charge of an improvement containing an interior landmark shall keep in good repair (1) all portions of such interior landmark and (2) all other portions of the improvement which, if not so maintained, may cause or tend to cause the interior landmark contained in such improvement to deteriorate, decay or become damaged or otherwise fall into a state of disrepair.

c. Every person in charge of a scenic landmark shall keep in good repair all portions thereof.

d. The provisions of this section shall be in addition to all other provisions of law requiring any such improvement to be kept in good repair.

§ 25-312 Remedying of dangerous conditions. a. In any case where the department of buildings, the fire department or the department of health, or any officer or agency thereof, or any court on application or at the instance of any such department, officer or agency, shall order or direct the construction, reconstruction, alteration or demolition of any improvement on a landmark site or in an historic district or containing an interior landmark, or the performance of any minor work upon such improvement, for the purpose of rem-

edying conditions determined to be dangerous to life, health or property, nothing contained in this chapter shall be construed as making it unlawful for any person, without prior issuance of a certificate of no effect on protected architectural features or certificates of appropriateness or permit for minor work pursuant to this chapter, to comply with such order or direction.

b. The department of buildings, fire department or department of health, as the case may be, shall give the commission as early notice as is practicable, of the proposed issuance or issuance of any such order or direction.

§ **25-213 Public hearings; conferences.** a. The commission shall give notice of any public hearing which it is required or authorized to hold under the provisions of this chapter by publication in the City Record for at least ten days immediately prior thereto.

The owner of any improvement parcel on which a landmark or a proposed landmark is situated or which is a part of a landmark site or proposed landmark site or which contains an interior landmark or proposed interior landmark, or any property which includes a scenic landmark or proposed scenic landmark shall be given notice of any public hearing relating to the designation of such proposed landmark, landmark site, interior landmark or scenic landmark, the amendment to any designation thereof or the proposed rescission of any designation or amendment thereto. Such notice may be served by the commission by registered mail addressed to the owner or owners at his or her or their last known address or addresses, as the same appear in the records of the office of the commissioner of finance or if there is no name in such records, such notice may be served by ordinary mail addressed to "Owner" at the street address of the improvement parcel or property in question. Failure by the commission to give such notices shall not invalidate or affect any proceedings pursuant to this chapter relating to such improvement parcel or property.

b. At any such public hearing, the commission shall afford a reasonable opportunity for the presentation of facts and the expression of views by those desiring to be heard, and may, in its discretion, take the testimony of witnesses and receive evidence; provided, however, that the commission, in determining any matter as to which any such hearing is held, shall not be confined to consideration of the facts, views, testimony or evidence submitted at such hearing.

c. The commission may delegate to any member or members thereof the power to conduct any such public hearing and to hold any conference required to be held under the provisions of sections 25-306 and 25-310 of this chapter.

d. The commission, may, in its discretion, direct that notice of any such public hearing on a request for a certificate of appropriateness, or on any plan formulated by the commission in relation thereto, be given by the applicant to such owners of property in the neighborhood of the improvement or improvement parcel to which such request relates, as the commission deems proper. When so directed, the applicant shall mail a notice of such hearing to such owners, at their last known addresses, as the same appear in the records of the office of the commissioner of finance, and shall likewise mail a notice of such hearing to persons who have filed written requests for such notice with the commission. A reasonable period of time, as prescribed by the regulations of the commission, shall be afforded the applicant for giving notice of such hearing to such owners and persons. Any failure to give or receive such notice shall not invalidate any such hearing or any determination made by the commission with respect to such request for a certificate or with respect to such plan.

§ 25-314 Extension of time for action by commission. Whenever, under the provisions of this chapter, the commission is required or authorized, within a prescribed period of time, to make any determination or perform any act in relation to any request for a certificate of no effect on protected architectural features, a certificate of appropriate-

ness or a merit for minor work, the applicant may extend such period of time by his or her written consent filed with the commission.

§ 25-315 Determinations of the commission; notice thereof. a. Any determination of the commission granting or denying a certificate of no effect on protected architectural features, a certificate of appropriateness or a permit for minor work shall set forth the reasons for such determination.

b. The commission shall promptly give notice of any such determination, and of any preliminary determination of insufficient return made pursuant to paragraph one of subdivision a of section 25-309 of this chapter, to the applicant. Such notice shall include a copy of such determination.

c. Subject to the provisions of section 25-304 of this chapter, any determination of the commission granting a certificate of no effect on protected architectural features, a certificate of appropriateness or a permit for minor work may prescribe conditions under which the proposed work shall be done, in order to effectuate the purposes of this chapter, and may include recommendations by the commission as to the performance of such work, provided that the provisions of this subdivision shall not apply to any notice to proceed granted pursuant to the provisions of subdivisions g and i of section 25-309 of this chapter.

§ 25-316 Transmission of certificates and applications to proper city agency. In any case where a certificate of no effect on protected architectural features, certificate of appropriateness or notice to proceed is granted by the commission to an applicant who has filed with the commission a copy of an application for a permit from the department of buildings, the commission shall transmit such certificate or a copy of such notice to the department of buildings. In any case where any such certificate or notice is granted to an applicant who has filed an application for a special permit with the city planning commission or the board of standards and appeals pursuant to article seven of the zoning resolu-

tion, the commission shall transmit such certificate or a copy of such notice to the planning commission or the board of standards and appeals, as the case may be.

§ **25-317 Penalties for violations; enforcement.** a. Any person who violates any provision of subdivision a of section 23305 of this chapter shall be guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars and not less than one hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.

b. Any person who violates any provision of subdivision a of section 25-310 of this chapter or any provision of section 25311 shall be punished, for a first offense, by a fine of not more than two hundred and fifty dollars or less than twenty-five dollars or by imprisonment for not more than thirty days, or by both such fine and imprisonment, and shall be punished for a second, or any subsequent offense, by a fine of not more than five hundred dollars or less than one hundred dollars, or by imprisonment for not more than three months, or by both such fine and imprisonment.

c. Any person who files with the commission any application or request for a certificate or permit and who refuses to furnish, upon demand by the commission, any information relating to such application or request, or who wilfully makes any false statement in such application or request, or who, upon such demand, wilfully furnishes false information to the commission, shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than ninety days, or by both such fine and imprisonment.

d. For the purpose of this chapter, each day during which there exists any violation of the provisions of paragraph three of subdivision a of section 25-305 of this chapter or paragraph two of subdivision a of section 25-310 of this chapter or any violation of the provisions of section 25-311 of this chapter, shall constitute a separate violation of such provisions.

e. Whenever any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this chapter mentioned in subdivisions a and b of this section, the commission may make application to the supreme court for an order enjoining such act or practice, or requiring such person to remove the violation or directing the restoration, as nearly as may be practicable, of any improvement or any exterior architectural feature thereof or improvement parcel affected by or involved in such violation, and upon a showing by the commission that such person has engaged or is about to engage in any such act or practice, a permanent or temporary injunction, restraining order or other appropriate order shall be granted without bond.

§ 25-318 Reports by commission on plans for proposed projects. a. Plans for the construction, reconstruction, alteration or demolition of any improvement or proposed improvement which:

(1) is owned by the city or is to be constructed upon property owned by the city; and

(2) is or is to be located on a landmark site or in an historic district or contains an interior landmark;

shall, prior to city action approving or otherwise authorizing the use of such plans with respect to securing the performance of such work, be referred by the agency of the city having responsibility for the preparation of such plans to the commission for a report. Such report shall be submitted to the mayor, the city council and to the agency having such responsibility and shall be published in the City Record within forty-five days after such referral.

b. (1) No officer or agency of the city whose approval is required by law for the construction or effectuation of a cityaided project shall approve the plans or proposal for, or application for approval of, such project, unless, prior to such approval, such officer or agency has received from the

commission a report on such plans, proposal or application for approval.

(2) All such plans, proposals or applications for approval shall be referred to the commission for a report thereon before consideration of approval thereof is undertaken by any such officer or agency, and the commission shall submit its report to each such officer and agency and such report shall be published in the City Record within forty-five days after such referral.

c. Except as provided in subdivision d of section 25-303, where the commission so requests, plans for the construction, reconstruction, alteration or demolition of any landscape feature of a scenic landmark shall, prior to city action approving or otherwise authorizing the use of such plans with respect to securing the performance of such work, be referred by the agency of the city having responsibility for the preparation of such plans to the commission for a report. Such report shall be submitted to the mayor, the city council and to the agency having such responsibility and shall be published in the City Record within forty-five days after such referral. No such report shall recommend disapproval of any such plans where land contour work or earthwork is necessary in order to confirm with applicable laws concerning regulation of lots, storm water disposal and water courses. The commissioner of parks and recreation may request an advisory report concerning work proposed to be performed on, or in the vicinity of, a scenic landmark, and such report shall be published in the City Record.

§ 25-319 Regulations. The commission may from time to time promulgate, amend and rescind such regulations as it may deem necessary to effectuate the purposes of this chapter, including, but not limited to, regulations:

(a) for the protection, preservation, enhancement, and perpetuation and use of landmarks, interior landmarks, scenic landmarks and historic districts, subject to the provisions of section 25-304 of this chapter. Such regulations may apply to one or more historic districts or to one or more portions

of an historic district and may vary from area to area in their provisions;

(b) relating to the determination of the earning capacity of improvement parcels by the commission pursuant to section 25309 of this chapter;

(c) relating to the procedures of the commission in carrying out its functions, powers and duties under this chapter, including procedures for the giving of notice by the commission by mail or otherwise, where notice is required by this chapter; and

(d) relating to forms to be used in proceedings before the commission.

§ 25-320 Investigations and reports. The commission may make such investigations and studies of matters relating to the protection, enhancement, perpetuation or use of landmarks, interior landmarks, scenic landmarks and historic districts, and to the restoration of landmarks, interior landmarks, scenic landmarks and buildings in historic districts as the commission may, from time to time, deem necessary or appropriate for the effectuation of the purposes of this chapter, and may submit reports and recommendations as to such matters to the mayor and other agencies of the city. In making such investigations and studies, the commission may hold such public hearings as it may deem necessary or appropriate.

§ 25-321 Applicability. The provisions of this chapter shall be inapplicable to the construction, reconstruction, alteration or demolition of any improvement on a landmark site or in a historic district or containing an interior landmark, or of any landscape feature of a scenic landmark, where a permit for the performance of such work was issued by the department of buildings, or, in the case of a landscape feature of a scenic landmark, where plans for such work have been approved, prior to the effective date of the designation, or amended or modified designation, pursuant to the provisions of section 25-303 of this chapter, first making the pro-

visions of this chapter applicable to such improvement or landscape feature or to the improvement parcel or property in which such improvement or landscape feature is or is to be located.

NEW YORK CITY ZONING RESOLUTION § 81-742

81-742
Restrictions on demolition of theatres

No demolition permit shall be issued by the Department of Buildings for any theatre listed in this Section as a "listed theatre", unless:

(a) it is an unsafe building and demolition is required pursuant to the provisions of Sections 26-235 to 26-243 (Title 26, Chapter 1, Article 8, Unsafe Buildings and Property) Administrative Code;

(b) it has been designated a landmark by the Landmarks Preservation Commission and a notice to proceed has been issued to the owner pursuant to Section 25-309 of the Administrative Code permitting demolition that contemplates removal of the theatre from theatre use; or

(c) the City Planning Commission, by special permit after public notice and hearing and subject to Board of Estimate action, permits its demolition upon making the following findings:

(1) that demolition of the theatre structure will not unduly diminish the character of the Theatre subdistrict as a cultural, entertainment and theatrical showcase, taking into consideration any or all of the following list of factors:

(i) current physical characteristics of the theatre that affect its suitability as a legitimate theatre, including but not limited to seating capacity, configuration and location;

(ii) history of its use as a legitimate theatre, presenting legitimate attractions to the general public;

(iii) likelihood of its future use for legitimate theatre production under reasonable terms and

conditions generally prevailing in the theatre industry;

(iv) applicant's plans, if any, for replacement of the theatre structure with a development containing replacement uses supportive of the character of the Theatre subdistrict; and

(2) that there exists a legal commitment binding upon all parties in interest of the zoning lot containing the theatre that any development or enlargement on a zoning lot containing a portion or all of the former site of the listed theatre shall reserve floor space at least equivalent in amount to the floor area of the theatre devoted exclusively to uses described in Section 81-725 (Entertainment-related uses) and meeting the requirements of Section 81-724 (Requirements for entertainment-related uses) for the life of such development or enlargement. If the area of the zoning lot containing the theatre is less than 20,000 square feet and the Commission finds that the allocation of floor space at least equivalent in amount to the total floor area of the theatre to uses described in Section 81-725 (Entertainment-related uses) is impractical or unreasonable, the Commission may authorize a reduction in the amount of the area allocated to such uses. Any development or enlargement on a zoning lot containing a portion or all of the former site of a listed theatre must, however, meet the requirements of Section 81-724 (Requirements for entertainment-related uses), whether or not the zoning lot is located within the area described in that section.

The theatres to which the provisions of this Section apply are predominantly free standing theatres with full stage and wings and are identified as listed theatres in Table 1 below.

[table omitted]

In the case of an existing legitimate theatre for which construction bonus floor area was granted pursuant to regulations in effect prior to May 13, 1982, no provision of this

amendment shall be construed as changing any previously existing responsibility of the owner or lessee of such theatre for continuance of its use as a legitimate theatre.

Transcript of Proceedings Before
Landmarks Preservation Commission

(Appellate Record p. 1354; 12/09/86)

Chairman Norman: Arguing back and forth about that. The numbers of items that the staff has identified, and hopefully you too will agree, represent significant details either on the interior or the exterior of the building, is viewed by the owners as problematic, particularly when it comes to replacing any of those items due to the cost factors that may be involved. And as you know, the Commission does not look to cost in terms of how these things are—are replaced or changes made on a building. We rather look to the appearance, the—the look of it, and—and we hope that ways can be found to achieve that—that appearance without an overly huge expenditure of money. And we work with applicants continually, and you know this, to find innovative and creative ways to satisfy those needs. So the argument that cost should be considered by the Commission, I have rejected. We hope that the owners will understand that our guidelines are created in a way to enhance their capability of meeting the requirements of regulation. As you know, we worked very long and hard about trying to define clearly their need for production-related changes, and we've developed a format and a procedure which enables them to make production-related changes without a lot of delay—without *any* delay, I would say—and in a way that does not require a good deal of staff interface. I think I believe them when they say that there are changes that go on, but I certainly do not believe them when they talk about the magnitude of changes [indiscernible]. It's very, very seldom that an entire theatre's completely revamped just to take care of production. "Cats" is rarity and an unusual step.

Transcript of Proceedings Before Landmarks Preservation Commission

(Appellate Record p. 2313; 06/17/86)

Commissioner Robbins: * * *

From an architectural point of view the theatres are no great shakes, but we are not here to talk about them as architectural because if they were, I would have to maintain the same position: They are no great shakes.